85-481

NO.

Supreme Court, U.S.
FILED
SEP 3 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

Term, 1985

LEWIS C. STANLEY, Petitioner,

v.

JOHN AUBERT, JOAN AUBERT AND SINKERS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Appendix To Petition

Lewis C. Stanley, Pro Se
Box 80 1 Lemore Circle
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BEST AVAILABLE COPY

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*This document is a photo-copy of the original to show how it was reworded in the Judge's own handwriting.

SUPREME COURT OF NEW JERSEY
C-828 September Term 1984 23,862
SINKERS, INC.,et al., v. LEWIS C. STANLEY and GEORGE T.MCMAHON et al.
ORDER denying petition for certification and dismissing appeal
Filed June 3, 1985

To the Appellate Division, Superior Court

A petition for certification of the judgment in A-5039-83T3 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs; and it is further

ORDERED that the appeal in the within matter is dismissed pursuant to R.2:12-9.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 30th day of May, 1985.

Stephen W. Townsend
CLERK OF THE SUPREME COURT

SUPREME COURT OF NEW JERSEY
C-828, SINKERS, 1 NC., et al., Defendants on Counterclaims Transferred from the Law Division v. GEORGE T. MCMAHON and GRACE MCMAHON in the Interest of NEW HORIZONS BUSINESS SYSTEMS, INC.
NOTICE OF APPEAL filed March 28, 1985

To: Kemp & Kemp, Attorneys for Defendants on the Counterclaims, 2382 Whitehorse-Mercerville Rd., Trenton, N.J. 08619

TAKE NOTICE that appellant attorney appeals to the Supreme Court of New Jersey upon the ground that a substantial question exists as to whether his rights and those of clients, George T. McMahon and Grace McMahon in the interest of New Horizons Business Systems, Inc., under the Constitutions of the United States and of the State of New Jersey are violated by the judgment of the Appellate Division of the Superior Court, Docket No. A 5039-83T3, entered February 8, 1985 as to which the Appellate Division on March 19, 1985

denied a petition for rehearing and a motion to correct mistakes.

Lewis C. Stanley
Appellant, Pro Se

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION, NO. 5039-
83T3 SINKERS, INC., Defendants
v. GEORGE T. MCMAHON et al,
Counterclaimants, NOTICE OF
PETITION FOR CERTIFICATION
filed March 28, 1985

To Kemp & Kemp, Attorneys for Defendants on the Counterclaims, 2382 Whitehorse-Mercerville Rd., Trenton, N.J. 08619

TAKE NOTICE that appellant attorney shall petition the Supreme Court of New Jersey to review all of the judgment of the Appellate Division of the Superior Court entered February 8, 1985 as to which the Appellate Division on March 19, 1985 denied a petition for rehearing and a motion to correct mistakes, filed and served February 19, 1985.

Lewis C. Stanley
Appellant, Pro Se

(A Notice of Appeal is at the same time being served and filed.)

APPELLATE DIVISION, A-5039-83T3, Motion No. M-2776-84
ORDER filed March 19, 1985

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS: PETITION FOR REHEARING AND FOR FURTHER RELIEF, DENIED

FOR THE COURT:

MELVIN P. ANTELL P.J.A.D.

LETTER BRIEF TO N.J. SUPREME COURT on Petition for Certification and Notice of Appeal, filed April 8, 1985

Dear Chief Justice and Justices:

This case marks the first time in the history of New Jersey jurisprudence that inveterate judicial insistence upon undivided loyalty by fiduciaries has been compromised by allowing John and Joan Aubert (Auberts)--officers in New Horizons Business Systems, Inc. (Horizons) using its headquarters, property and resources--to divert business within its corporate purposes unto themselves and their alter ego Sinkers, Inc. (Sinkers).

Extant at the time claims against Aubert-Sinkers, asserted by George T. (Gerry) and Grace McMahon, equal partners in Horisons, in the interest of the corporation, were dismissed without a trial on the merits was an Order (Appendix Vol. I, 40a) requiring Aubert-Sinkers to

account for all monies received from their contract with the brokerage house of Merrill Lynch to produce the same kind of computerized bond data book Horizons had produced for Janney, Montgomery Scott. Clearly the Law of the Case, the Order was never enforced by the courts below.

Such departure from established judicial public policy should be special reason enough for certification by New Jersey's top court--quite apart from the violations of rights, protected against groundless encroachment by the Constitutions of the United States and of New Jersey, in the way it was accomplished.

It was accomplished through disqualifying the undersigned appellant (Stanley) as the attorney representing the interest of the Horizons corporation on behalf of the McMahons who--as the record made clear to the judges below--could not afford to pay the usual fees of

an attorney who did not have the ethical and professional duty that Stanley had to protect the interests of Horizons.

At depositions they were allowed to evade for almost a year, the Auberts had to admit these basic facts:

> Stanley was the only attorney ever discussed and considered for Horizons with their equal partners, the McMahons and paid a fee, modest as it was, by Horizons; further that they authorized the McMahons to contact Stanley and engage his services. (App. Vol. II, 317a-20 et seq.)

Well settled law is such--and Aubert-Sinkers counsel could offer nothing to the contrary in their brief--that the Auberts are bound by the acts of the McMahons engaging Stanley to incorporate and represent Horizons--it was already doing business--with respect to any legal problems that might arise. (The statutory and legal authorities are spelled out in appellant's brief in the Appellate Division.)

It is clear then that Stanley had to represent the interests of the Horizons corporation and only such individuals therein whose interests coincided with Horizons. Compare Weaver v. United Mine Workers, 492 F2d 580 (DC Ca. 1973) with Yablonski v. United Mine Workers (I), 448 F2d 1175 (DC CA.1971) and (II), 454 F2d 1036 (DC CA. 1971) cert. den. 406 US 906 (1972). And then compare Stanley's representation with the shameless misconduct of Aubert-Sinkers counsel, a former judicial clerk, in professing to join with Aubert-Sinkers as a party, Horizons, and proceeding in a complaint, scandalous and insufficient on its face as any basis for the temporary restraining order with which he initiated this litigation in obtaining it from the judge for whom he had clerked, to make claims adverse to the interest of Horizons. Conduct less blatant than that of Aubert-Sinkers coun-

sel is condemned as unethical serving of two masters in Aysseh v. Lawn, 186 NJ Super 218 (C.Div.1982) and Messing v. FDI, 439 FS 776 (DC NJ 1977). Yet the McMahon-Horizons motion to disqualify him was denied.

Stanley on the other hand was the sole incorporator of New Horizons. This is a key to one of the most striking admissions that had to be extracted by deposition from the Auberts. They admitted that not only did John Aubert, the managing partner and secretary of Horizons, fail to object to the certificate of incorporation Stanley prepared--his only contact was a call to the attorney about a mistake in his middle initial. John Aubert actually wrote into a resolution as to the business of Horizons in his own hand the following: "computer and computer related services as outlined in our Certificate of Incorporation." (App. Vol.

II, 309a-310a)

When the purposes of Horizons--absent from the Aubert-Sinkers complaint--as set forth in its Certificate were read aloud in a crowded courtroom, the Order that Aubert-Sinkers account for the Merrill Lynch monies ensued.

[Thereafter the case was always scheduled to be heard last. As detailed in the Statement of Facts and Procedural History comprising 20 of the 28 pages of appellant's brief in the Appellate Division, when Stanley learned that the Auberts were using the Horizons computer to make discs for the Merrill Lynch contract of Sinkers--a trespasser in New Horizons headquarters--he deposited the discs in the bank in which Horizons had its account as Horizons property for safekeeping against use by anyone in the corporation to the detriment of the others pending agreement or a court order. He

then tried to bring all the parties together to be made aware of the stern strictures of undivided loyalty that New Jersey law imposed upon fiduciaries. That he was ethically bound "to take active steps to oppose" breaches of fiduciary duty to the corporation is made clear at pages 1136 and 1352 of "Developments in the Law: Conflicts of Interest in the Legal Profession," 94 Harv. L. R. 1247-1503 (April 1981), frequently cited and relied upon by this Court. He copied and sent to all concerned extracts of the New Jersey cases insisting upon uncompromising adherence to the rule of fiduciary duty, repeating his suggestion for a conference meeting which had been spurned by Aubert-Sinkers counsel. (App.Vol.I, 1a through 12a) Aubert-Sinkers counsel then obtained the TRO ex parte with a complaint that charged Stanley in effect with stealing the discs and alleging huge damages if

there were any delay in producing the bond data book for Merrill Lynch. (App. Vol.I, 13a through 33a) Only upon deposition more than a year later was it learned that the McMahons had overlooked one disc and that the Auberts had used it to have the book ready for printing (App.Vol.II, 332a-2]) upon the very short return day--in violation of Court Rules--of the TRO and show cause order. Aubert further admitted that any delay was attributable to Merrill Lynch--"Merrill Lynch has more things on their minds, more than one simple promotion." (App.Vol.II, 340a-15) Moreover--and again absent from the Aubert-Sinkers complaint--when the Merrill Lynch contract (App.Vol.II, 258a)was made known many months later, it was seen to be an integrated document not subject to any modification except in writing and that it called for the production of at least one book a year but without any dead-

line at all for its delivery. The misconduct of failing to make full disclosure in obtaining an ex parte TRO was later compounded by further ex parte contact with the judge's office in an attempt to render the Order to Account moot by purporting to dismiss the Aubert-Sinkers complaint voluntarily--an attempt that failed with respect to the Order to Account but succeeded, after first being denied, as to voluntary dismissal and rendering moot the motions by the McMahons in the interest of Horizons as to the unclean hands and scandalous Aubert-Sinkers complaint, upon which the judge had previously promised to render a decision. Transferred to the Chancery Division were the McMahon claims in the interest of New Horizons and Aubert-Sinkers reasserted their claims as counterclaims, again joining Horizons with themselves while contending adversely to Horizons.]

Nevertheless the fiction asserted as the ground for disqualifying Stanley--twice rejected by the two prior judges in the preceding 2 1/2 years of litigation unduly protracted and convoluted by a plethora of error particularized in appellant's brief in the Appellate Division--was an "appearance" of conflict of interest vis-a-vis the Auberts. (App.Vol.II, 378a) The judge agreed and admitted, however, that there was not and could not be any actual conflict since Stanley had received no confidences or information of any kind from the Auberts that could be used against them.

"Yes," said the disqualifying judge, "I don't see any--there is certainly no representation by counsel that there is any actual confidence exchanged." (Transcript of 9/8/83 at 40-11)

Such being the case, there was no prejudice whatsoever to the Auberts. It

is set forth in the American Bar Association Law Notes on Professional Responsibility and Liability, p. 18 (ABA Press, 1979) that "A party should not be permitted to disqualify the opposing attorney unless he is able to show real prejudice."

"The danger of damage to public confidence in the legal profession would be great if we were to allow unfounded charges of impropriety to form the sole basis for an unjust disqualification," said the esteemed federal Judge Jack B. Weinstein in Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 370 FS 581, 589 (ED,NY DC. 1973) aff'd 518 F2d 751 (2 CA. 1975) where there was some actual prior contact with an opposing party's matters by the attorney but were not deemed of sufficient importance or materiality to warrant disqualification.

The prejudice to the McMahons and the interests of New Horizons is however

manifest. It is obviously greater than that which led this Court to refuse to disqualify an attorney in State v. Galati, 64 NJ 572, 579 (1974) even though it found that there was more than an appearance of conflict. Denial of the right to counsel of choice whether the case be civil or criminal is said to be of constitutional consequence in "Developments in the Law: Conflicts in the Legal Profession," supra, at 1295:

> . . . adequate assistance of counsel is the universal predicate to vindicating basic rights of due process of law and to providing clients with a meaningful day in court.

This Court warned in In re Professional Ethics Opinion 452, 87 NJ 45, 50 (1981) that where "there is no conflict in fact, an appearance can sometimes shade into the illusion of conflict" and held that an appearance of conflict "must be something more than a fanciful possibility. It must have some reasonable basis."

The appearance of impropriety even when recommended by the Attorney General as the basis for exercising discretion to refuse to award a contract to a low bidder, as permitted by statute, was held to be so vague as to be constitutionally infirm im Keyes Martin v. Dir., Div. of Purchase 196 NJ Super 52, 64 (App.Div. 1984). It said (p.62):

> At the heart of the problem is the conplete obscurity of the standard on which the Director acted. The "appearance of wrongdoing" standard is no standard at all. It is completely non-objective. "Appearances" exist only in the eye of the beholder. Whether certain circumstances give rise to an appearance of wrongdoing merely provokes the further question of "appearance to whom?" Do we speak of a cynical public or a trusting public? a public which is informed as to the facts, partially informed or uninformed?

A similar attack on the unbridled subjectivity of "appearance" of conflict to disqualify an attorney when there is no conflict in fact is made in the well reasoned analyses in Woods v. Covington

Cty Bank, 537 F2d 804 (5 CA.1976):Duncan v. Merrill Lynch, 646 F2d 1020 (5 CA.1981); Wayland v. Shore Lobster Corp., 537 FS 1220 (SD NY. 1982); Bobbitt v. Victorian House, Inc., 545 FS 1124 (ND Ill. 1982); Allegaert v. Perot, 434 FS 790, 799 n.13 (SD NY. 1977); City of Cleveland v. Cleveland El. Co., 440 FS 193, 201-205 (ND Oh. 1976) aff'd 573 F2d 1310 (6 CA. 1977) cert. den. 435 US 996 (1978).

Herein, there is more than illusion and fiction in conjuring up an appearance of conflict when no conflict exists. It violates that which this Court said was "basic" in New Jersey law that a "corporation is an entity separate from its stockholders. . . . Conversely, one who accepts the benefits of incorporation must also accept the burdens that flow from the use of a corporate structure." Lyon v. Barrett, 89 NJ 294, 300 (1982). Even had the Auberts rather than Horizons paid a

fee to Stanley, it violates then existing DR 5-107 (B):

> A lawyer shall not permit a person who recommends, employs or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

Likewise ignored and violated is Opinion 462 of the N.J. Advisory Committee on Professional Ethics, invoking the same rule of undivided loyalty for lawyers as well as parties as made classic by Justice, then Chief Judge, Cardozo in Meinhard v. Salmon, 249 NY 458, 463, 164 NE 545, 62 ALR 1 (1928) and quoted innumerable times in the New Jersey reports, which holds that "the client is the corporation and not the stockholders, officers, directors or employees thereof." Endorsed and relief upon therein is Ethical Consideration 5-18 which Stanley believed to be the settled law as to his professional obligation and ethical duty:

> A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally, a lawyer for an entity is requested by a stockholder, directorm officer, employee, representative or other person connected with the entity to represent him in an individual capacity; in such case, the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

That Stanley adhered to these ethical precepts is as clear as their violation by Aubert-Sinkers counsel.

Having no good answer to all the above settled law, Aubert-Sinkers counsel came up with a notion abhorrent to the role of a lawyer in a democratic society. But it served to flag the violations of constitutionally protected rights in disqualifying an attorney for non-existent appearance of conflict of interest. He asserted in his brief to the Appellate

Division that an attorney had no standing to appeal a disqualification although the instances of such appeals are legion and there is no reported New Jersey case refusing to consider such appeal.

It should be obvious that an attorney, as much as anyone else, has property and liberty rights to practice his profession and further his economic and reputational interests, subject only to legitimate regulation that is within the confines of the constitutionally permissible. Goldfarb v. Va. State Bar, 42] US 773, 95 S Ct 2004, 44 L Ed2d 572 (1975); Bates v. State Bar of Arizona, 433 US 350, 97 S Ct 2691, 53 L Ed2d 810 (1977). In In re Greenberg, 21 NJ 213, 223 (1956), Mr. Justice Jacobs quoted from Bradley v. Fisher, 80 US 335, 20 L Ed 646, 652 (1872):

> Admission as an attorney is not obtained without years of labor and study. The office which the party thus acquires is one of value, and often becomes the source of great honor and

> emolument to its possessor. To most persons who enter the profession, it is the means of support to themselves and their families.

That which is groundless, arbitrary, capricious and unreasonable is in the law a violation of substantive due process. It is an invasion of these constitutional rights of a lawyer under Article I, Section 1 of the N.J. Constitution and the Fifth and Fourteenth Amendments of the U.S. Constitution to disqualify an attorney from pursuing his profession and the rights of his clients for reasons that are utterly groundless and completely subjective when in fact he is following established precepts of ethical conduct and obligation and the judicial public policy of undivided loyalty by fiduciaries. It is respectfully submitted that such is the case with the opinion disqualifying appellant (App.Vol.II, 378a) sustained without analysis in the one

paragraph affirmance by the Appellate Division (Suppl. App.8sa).

Conclusion

Because the result below violates the constitutional rights of appellant attorney and his clients, firmly fixed ethical precepts and the judicial public policy of undivided loyalty by fiduciaries and is a gross miscarriage of justice, certification should be granted to the end that the disqualification of counsel for the McMahons in the interest of New Horizons Business Systems, Inc., be lifted and the dismissal of their claims without a trial on the merits set aside. I certify that this petition presents substantial questions and is filed in good faith and not for purposes of delay.

Respectfully submitted,
Lewis C. Stanley

APPELLATE DIVISION, A-5039-82T3
Motion and Petition for Rehearing filed February 19, 1985

To: Kemp & Kemp, Attorneys for Defendants on the Counterclaims, 2382 Whitehorse-Mercerville Rd., Trenton, N.J. 08619

Appellant attorney Lewis C. Stanley hereby moves to correct the following clerical mistakes and errors arising therefrom in the annexed one-paragraph decision of the Appellate Division dated February 8 received February 11, 1985:

a. The statement therein that the Judge below wrote a letter opinion "for the Law Division" is incorrect.

The record clearly shows that she severed and transferred to the Law Division claims against this appellant as an individual. The only matter upon which she undertook to pass in her opinions was whether this appellant attorney had a right and duty to represent the McMahons in the Interests of New Horizons Business Systems, Inc., upon counterclaims trans-

ferred to the Chancery Division.

That transfer occurred when Aubert-Sinkers was, over objection that it was manifestly improper, permitted after first being disallowed to "dismiss voluntarily" all claims in their scandalous and unethical complaint in the Law Division while under Order to Account for business properly belonging to New Horizons which they had diverted to their personal gain. They revived these claims in Chancery. But the Order to Account was still extant in the Chancery Division when the Judge below dismissed the McMahon claims upon the ground that they had failed to appear for trial although the only notices they received were for pretrial on a different date. This failure of justice on the merits occurred after she severed the claims against counsel as an individual; overrode two prior judges to disqualify counsel for alleged "appear-

ance" of conflict--while admitting that it did not actually exist and that there was no confidences or information from the Auberts to Stanley--; stated she would do everything to assure his appellate remedy; but then denied a stay so that it could be sought. It had been made clear on the record that the McMahons were so hard pressed for funds that it would be most difficult if not impossible to secure other counsel who had no existing obligation to protect the interests of New Horizons.

b. It is therefore evident from the above that the only correct caption for this case is as set forth herein and in the Notice of Appeal and the appellant's papers. The caption in the decision received February 11, apparently copied from respondents' papers is a manifest mistake. It fails to reflect the record and nowhere in the Rules is there any

sanction or permission for an opposing party to alter a correct caption as set forth by the moving party to demonstrate the true state of the matter.

Correction of this mistake and the error arising therefrom is necessary to avoid confusion and prejudice.

This is all the more so because someone in the office of the Clerk, without any known precedential authority, undertook--when docket numbers were very belatedly and prejudicially given--to assign different numbers to this appeal and to the simultaneous pro se appeal of the McMahons who asked that it be held pending resolution of the disqualification issue. Such fragmentation by manipulation of docket numbers is fraught with prejudice and confusion violating the stated purport of our Court Rules, 1:1-2, "to secure a just determination, simplicity in procedure, fairness in adminis-

tration and the elimination of unjustifiable expense and delay."

PETITION FOR REHEARING

This petition respectfully requests rehearing for the following reasons:

1. Malefactors, who dishonor their fiduciary duty by diverting corporate business to their personal gain for which they are under Order to Account secured by the attorney, engaged to incorporate and represent the corporation, to whom they imparted no confidences or information and with whom they had no contract other than a telephone call as to a mistaken middle initial in a name in the corporate papers, may not seek to disqualify him.

"A party should not be permitted to disqualify the opposing attorney unless he is able to show real prejudice." American Bar Association Law Notes on Professional Responsibility and Liability,

p. 18, "Conflict of Interest and the Lawyer in Civil Practice," by Charles P. Kindregan (ABA Press, 1979).

2. When there is no basis in fact or in law to attribute to such attorney "appearance" of conflict of interest with such malefactors, disqualifying him on such specious and illusory ground violates a constitutional right to pursue and engage in one's profession and to secure justice for his clients.

3. When his clients are unable to pay usual and customary fees to secure other counsel who have no prior legal or ethical obligation to protect the corporation, disqualifying the attorney of their choice and then dismissing their claims without a hearing on the merits denies fundamental fairness and due process.

". . . adequate assistance of counsel is the universal predicate to vindicating basic rights of due process of law and to

providing clients with a meaningful day in court." Developments in the Law: Conflicts of Interest in the Legal Profession, 94 Harv. L.R. 1247-1503 at p.1295 (April 1981).

An attorney is ethically bound to resist breaches of fiduciary duty to the corporate entity and to "take active steps to oppose" them. Idem, pp. 1336, 1352.

4. The result below for the first time in the history of New Jersey jurisprudence condones and shoves under the rug blatant breach of fiduciary duty by the managing officer of a corporation.

5. While conceiving of appearance of conflict where none admittedly exists, the court below tolerated and condoned actual conflict of interest by the malefactor's counsel, a former judicial clerk--as well as ex parte contact with the office of the judge who had employed him--and

refused to disqualify him.

I hereby certify that the foregoing is submitted in good faith and not for purposes of delay and request that the offices of the Clerk and the Judges involved preserve the briefs and the voluminous appendices for further use if need be.

Dated: February 18, 1985

Respectfully submitted,

Lewis C. Stanley

APPELLATE DIVISION, A-5039-83T3
Extract from Appellant's Brief
filed August 16, 1985

ARGUMENT

Point I. PARTNERS WHO AUTHORIZE THEIR PARTNERS TO ENGAGE A NAMED ATTORNEY ARE BOUND BY ACTS AND DECLARATIONS OF THOSE SO AUTHORIZED THAT THE ATTORNEY IS TO REPRESENT THEIR BUSINESS ENTITY HE INCORPORATES. PARTNERS SO BOUND WHO IMPART NO CONFIDENCES WHATSOEVER TO THE ATTORNEY MAY NOT SEEK TO DISQUALIFY HIM FOR ALLEGED "APPEARANCE OF CONFLICT" WHEN HE TRIES TO HAVE THEM FULFILL THEIR FIDUCIARY DUTY OF LOYALTY TO THE CORPORATION AND ACTIVELY OPPOSES THEIR BREACH THEREOF. THIS IS ESPECIALLY SO WHEN THE PARTNERS SO BOUND KNOW THEIR PARTNERS WILL BE EFFECTIVELY DEPRIVED OF COUNSEL BECAUSE THEY CANNOT AFFORD CUSTOMARY FEES OF ATTORNEYS WHO HAVE NO PRIOR ETHICAL OBLIGATION TO PROTECT THE CORPORATION'S INTERESTS. TO HOLD OTHERWISE IS SO FAR CONTRARY TO SETTLED

LAW AS TO RAISE QUESTIONS OF DUE PROCESS FUNDAMENTAL FAIRNESS AND EQUAL PROTECTION OF THE LAWS.

"Basic fairness," the Georgia Supreme Court said recently in reversing a trial judge who disqualified an attorney in Blumenfeld v. Borenstein, 247 Ga. 406, 276 SE 2d 607 (1981), "will not permit the disqualification of an attorney because of wrongdoing imputed to the attorney by reason of his status when as a matter of fact no wrongdoing exists. More important, the right to counsel is an important interest which requires that any curtailment of the client's right to counsel of choice must be approached with great caution."

The authoritative analysis, upon which the N.J. Supreme Court has placed great reliance time and again, in "Developments in the Law: Conflicts of Interest in the Legal Profession," 94 Harv. L.R.

1247-1503 (April 1981) points out that not only in criminal cases but in civil cases as well, denial of the right to counsel of choice may well result in consequences of constitutional magnitude (p.1295):

> . . . adequate assistance of counsel is the universal predicate to vindicating basic rights of due process of law and to providing clients with a meaningful day in court.

Our Supreme Court has warned that when, as here, "there is no conflict in fact, an appearance can sometimes shade into the illusion of conflict." In re Professional Ethics Opinion 452, 87 NJ 45, 50 (1981), holding that an appearance "must be something more than a fanciful possibility. It must have some reasonable basis." All the more required then is the "painstaking analysis of the facts and precise application of precedent" demanded in cases of alleged actual conflict. Reardon v. Marlayne, 84 NJ 460,469 (1980).

Here it is undisputed that Stanley was the only attorney ever discussed and considered by the equal partners in New Horizons and the only one ever paid a fee by New Horizons.

It is further undisputed that the Auberts did not see fit to contact or express any concerns to Stanley but instead authorized the McMahons to engage him. The basic question is for what purpose and for whom? This is the question avoided by the opinion below in its conclusionary assumption that the Auberts who had no contact with Stanley were nevertheless his clients as individuals when he undertook the assignments the McMahons asked of him with the express and apparent authority conferred upon them by the Auberts. That assumption was not only erroneous as a matter of law and without any support in the record but contradicts our Disciplinary Rules.

While it does not require a formal written agreement or a retainer fee to create an attorney-client relationship, In re Makowski, 73 NJ 265, 269 (1977), nevertheless it must be proved by "clear and convincing evidence," In re Palmieri, 76 NJ 51, 59 (1978), such as is utterly lacking herein to show any individual client-attorney relationship as a result of the authorized acts of McMahons.

The Auberts are as bound as if they were physically present when the McMahons engaged Stanley to represent the corporate entity he was asked to incorporate. They cannot be heard to deny that for which the McMahons contracted with Stanley and it is undisputed that the McMahons engaged him to represent the corporation. See our Uniform Partnership Act, NJSA 42:1-1 et seq., which makes one equal partner the agent of the others who are bound by his acts and transactions with third parties

unless there is specific advance notice from the others that the acting partner is doing so without authority. The Act is referred to with particularity in sec. 14A, Agent and Partner, Restatement of Agency, 2d to make clear the binding and estoppel nature of the acts and declarations of a partner who is authorized to do business for the other partners as were the McMahons by the Auberts with respect to reaching agreement with Stanley.

The Restatement's sec. 50, When Authority to Contract Inferred provides:

> Unless otherwise agreed, authority to make a contract is inferred from authority to conduct a transaction, if the making of such a contract is incidental to the transaction, usually accompanies a transaction, or is reasonably necessary to accomplish it.

Sec. 51, Authority Inferred from Authorizing Making of Contract provides:

> Unless otherwise agreed, authority to make a specified contract includes authority:

> (a) to make it in a usual form and with usual terms or, if there are no usual terms or forms, in an appropriate way; and
> (b) to do other acts incidental to its making which are usually done or which, if not usually done, are reasonably necessary for making it.

Here the McMahons and the Auberts were entering on a new enterprise that was novel to all of them. They wanted as quickly as possible the protection of a corporate form and of course, they had to accept the burdens as well as the benefits of the corporate instrumentality, it being basic and fundamental to New Jersey law that "a corporation is an entity separate from its stockholders." Lyons v. Barrett, 89 NJ 294, 300 (1982); State Dep't of Env. Prot. v. Ventron, 94 NJ 254, 281 (1983).

Clearly there is not a scintilla of evidence that suggests they were looking for legal representation as individuals rather than legal representation for an enterprise with which they were all unfa-

miliar in a field of complex and developing computer law. And they all knew that Stanley was aware of their circumstances and would hardly favor one over the other but would do right by the enterprise in its corporate form. Does that mean when one of them undertakes to betray the enterprise and cheat it, that Stanley can look away and do nothing about it? To permit of such a vacuum would be judicial toleration of fraud and deceit and breach of fiduciary duty. Who else but the attorney they turned to jointly--not for themselves as individuals --for the corporation structure protection could or would be responsible for its integrity?

Even if they had as individuals paid the minimal fee Stanley charged the corporation, they could not influence his professional obligation to protect the corporate entity. DR5-107(B) makes it

clear that the opinion below violates our Disciplinary Rules:

> A lawyer shall not permit a person who recommends, employs or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

It violates as well Opinion 462 of the N.J. Advisory Committee on Professional Ethics that the client "is the corporation and not the stockholders, officers, directors or employees thereof." The Opinion endorses and relies upon Ethical Consideration 5-18:

> A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differ-

ing interests are not present. Here it is clear that Stanley always acted in the interests of New Horizons and refused to act for any individuals whose interests did not coincide with that of the corporation. Thus when he deposited discs made on the New Horizons computer for safekeeping, he was protecting them as well from the wrath of the McMahons that they were being bilked as from the misuse of the discs to the detriment of the corporation by Aubert. Similarly he made it clear to the McMahons that he would represent them only in the interests of New Horizons. And it is further clear that he sought to bring the parties together in the interests of New Horizons and tried to avoid litigation and conflict. He was nevertheless ethically bound to oppose breaches of fiduciary duty to New Horizons and to "take active steps to oppose" them, Conflicts of Interest in the

Legal Profession, supra, pp. 1336, 1352.

It is both interesting and significant that Opinion 462, supra, of the N.J. Advisory Committee invokes the same principle as Stanley tried to "sell" to the Auberts and the McMahons--the rule of uncompromising loyalty made classic in Meinhard v. Salmon, 249 NY 458, 463, 164 NE 545, 62 ALR 1 (1928) by Justice, then Chief Judge Cardozo and repeated so often in the New Jersey cases as a matter of public policy:

> Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of the courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. . . . Only thus has

the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.

For an attorney to fight for adherence to that principle of New Jersey public policy against the Auberts' breach of fiduciary duty to New Horizons can hardly be said to create an appearance of conflict of interest with the Auberts when all had notice and knew that it was loyalty to New Horizons upon which he was insisting.

Perhaps most instructive on how far afield the Court below strayed are the famed United Mine Worker cases involving disqualification of counsel, Yablonski v. United Mine Workers, 448 F 2d 1175 (DC CA. 1971); Yablonski v. United Mine Workers, 454 F 2d 1036 (DC CA. 1971) cert. den. 406 US 906 (1972) and Weaver v. United Mine Workers, 492 F 2d 580 (DC CA. 1973). In the two Yablonski cases, charges of breach of fiduciary duty were brought against UMW president Tony Boyle. The

Court held that neither outside counsel for UMW could represent the union and Boyle nor could house counsel because the organization's interests differed from Boyle's as to the charges against him. By the time of Weaver, Boyle had lost office and the insurgents after Yablonski was murdered took over only to be faced by the same type of disqualification motion of their attorneys, now representing the union and them, that they had successfully brought against the former UMW-Boyle lawyers. Now, however, disqualification was denied, there being no conflict of interest between the union and its new officers who had never been charged with misconduct as to UMW affairs. Its comparison in footnote 18, p. 584 of representing clients with potentially conflicting interests as opposed to representing those with the same interest is quite on target herein. It notes

"there is no proscription where the interest subsequently represented by the attorney is not in fact adverse to the particular interest in connection with which he was previously employed." Thus, even if one were to play games with words and argue that Auberts were represented by Stanley when he organized New Horizons, the question still must be answered: for what purpose? Certainly not to further a purely individual interest of the Auberts. Rather it was to create a viable functioning corporate entity. And if the Auberts violated its integrity and the attorney had in no way imposed upon their confidences to their disadvantage, the very purpose of his employment made it a matter of his professional and ethical obligation to make clear to them their fiduciary duty and to oppose their breach if they persisted. What the Court below has done is to disqualify the one attor-

ney who had an ethical obligation to oppose the Auberts' breach of fiduciary duty at considerable financial sacrifice, well knowing how difficult it would be to secure other counsel to fight for the interests of New Horizons and continuation of New Jersey's insistence upon rigorous enforcement of fiduciary duty. Thus the public policy of New Jersey has indeed been impaired and breach of fiduciary duty in effect condoned. The interests of New Horizons should not have been left defenseless because the McMahons lack sufficient funds to retain an attorney who does not have Stanley's ethical obligation to the corporate entity.

Compare his insistence upon representation of one consistent interest, Wayland v. Shore Lobster, etc., Corp, 537 FS 1220 (SD NY 1982); Bobbitt v. Victorian House, Inc., 545 FS 1124 (ND Ill., 1982); Allegaert v. Perot, 434 FS 790, 799

n.13 (SD NY 1977); City of Cleveland v. Cleveland El. Co., 440 FS 193, 201-205 (ND Oh. 1976) aff'd 573 F 2d 1310 (6 CA, 1977) cert. den. 435 US 996 (1978) with representation of multiple parties with divergent interests condemned in Aysseh v. Lawn 186 NJ Super 218 (Chan. Div. 1982) and Messing v. FDI, Inc., 439 FS 776 (DC NJ 1977). It will be seen therefrom that it was indeed Aubert-Sinkers counsel who should have been disqualified while Stanley comported himself in accordance with his duty as an agent of the corporation New Horizons, Prate v. Friedman, 583 F 2d 42, 48 (2 CA. 1978); ABA/BNA, Lawyers Manual on Professional Conduct, 91:2003 (1984) and the cases and authorities cited therein.

Point II. EXTENSION OF THE DOCTRINE OF APPEARANCE OF CONFLICT UNDER THE CIRCUMSTANCES HEREIN WAS SO RADICAL AND UNPRECEDENTED THAT DISQUALIFICATION WHICH

WORKED PREJUDICE IN A 2 1/2 YEAR-OLD CASE SHOULD NOT HAVE BEEN ORDERED.

Not one of the cases cited by the Court below involves counsel engaged to represent a corporation being disqualified because he insisted upon compliance with fiduciary duty by a participant in the entity who agreed he should be engaged. The standards for so radical an extension of the doctrine of appearance of conflict enunciated below seem purely subjective and lack the objective content required by the well reasoned decision in Woods v. Covington Cty. Bank, 537 F 2d 804 (5 CA. 1976); see also Duncan v. Merrill Lynch, 646 F 2d (5 CA. 1981).

At the least, it must be said that disqualifying an attorney because he takes action against disloyalty to the corporation he agreed to represent is quite novel; so much so that it should not have led to disqualification. State v. Galati, 64 NJ

572, 579 (1974) found that an actual conflict of interest existed--not mere appearance--but because the situation had not been given consideration prior thereto, reversed an order to disqualify:

> Owing to the attorney's substantial involvement as defense counsel at this time, we cannot in good conscience compel him to abandon the defense, particularly in view of the probable prejudice to his client. In the future however all similar or like representations must be aschewed.

See also Ross v. Canino, 93 NJ at 410-411 (1983).

The prejudice to the McMahons' claim in the interest of New Horizons is manifest.

Point III. IT IS AN ABUSE OF DISCRETION FOR A THIRD JUDGE TO DISQUALIFY COUNSEL AFTER TWO PRIOR JUDGES REFUSED TO DO SO BASED UPON THE SAME FACTS.

In Metalsalts Corp. v. Weiss, 71 NJ Super 360, 362 (App.Div. 1962), the Appellate Division "strongly disapproved" of a

second judge considering a matter on the same facts and coming to a different decision:

> Where a first judge has already indicated his disposition of a matter, the same matter should not be raised before a second judge except in extraordinary circumstances, not here present.

In Clarkson v. Kelly, 49 NJ Super 10,18 (App.Div. 1958), Justice, then Judge, Schettino held:

> . . . before a second trial judge can vacate an order of another trial judge on the same set of facts he must determine whether or not the first trial judge's action "was without basis in law or fact or both, with the result that there was a denial of justice under the law." Hartpence v. Grouleff, supra (15 NJ at page 548). Had the second judge applied these principles on the record before him, we hold that he could not, in the proper exercise of his judicial discretion, have vacated the order of the first judge in dismissing the action without prejudice.

Conclusion

Disqualification of counsel for the McMahons in the interest of New Horizons Business Systems, Inc., should be reversed

and the dismissal of their claims without a trial on the merits set aside.

Respectfully submitted,

Lewis C. Stanley

APPELLATE DIVISION, A-5039-83T3
On Appeal from Superior Court,
Chancery Division, Somerset Cty.
Before Judges Antell and J.H.
Coleman
Opinion Filed February 8, 1985

PER CURIAM

The order under review dated October 2, 1983 disqualifying Lewis C. Stanley, Esq. from representing defendants George T. McMahon, Grace McMahon and G.M. Printing Services is affirmed substantially for the reasons stated by Judge Long in her oral opinion of September 28, 1983 and in her letter opinion of November 1983 for the Law Division.

APPELLATE DIVISION, A-5039-83T3
On motion for Summary Disposition
Order filed October 23, 1984

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS: MOTION FOR SUMMARY DISPOSITION, DENIED

FOR THE COURT:

MELVIN P. ANTELL P.J.A.D.

APPELLATE DIVISION, A-5039-83T3
Letter Brief on Motion for Summary Disposition filed
September 24, 1984

Dear Judges:

The record herein being complete and both sides having filed their briefs on appeal, the purpose of this letter brief is to demonstrate that there is no need for further briefing and that the relief requested should be granted as a matter of law.

Having no effective answer to the undisputed facts and settled law that the disqualification of appellant attorney herein was erroneous and violative of the Disciplinary Rules of the Code of Professional Conduct, respondent's brief comes up with a notion that is both absurd and at once abhorrent to the Constitution and to basic precepts of our system of justice and the lawyer's necessary role therein. It contends that the wrong of

erroneous disqualification is without a remedy, that an attorney has no standing to appeal therefrom. It cites no case or authority for such a proposition. Rather the one inapposite case on disqualification to which it refers, Reardon v. Marlayne, 83 NJ 460 (1980)--where there was obvious conflict of interest in an attorney who had long participated in representing the defense of General Motors in products liability cases undertaking when he left such employment to represent plaintiffs in a products liability case against General Motors--shows that the Appellate Division not only considered the matter on appeal but the Supreme Court granted leave to appeal to it from a decision adverse to the attorney and his new firm.

Moreover there is a countless myriad of reported cases on appeals as to disqualification both in New Jersey and else-

where. Reported cases considering the issue unanimously hold that the grant of disqualification (as distinguished from a denial) is so grievous in civil cases that there is a right of immediate, although technically interlocutory, appeal. See by example Interco Systems, Inc. v. Omni Corporate Services, Inc., 733 F 2d 253, 254-5 (2 CA. 1984); Armstrong v. McAlpin, 625 F 2d 433,440-1 (2 CA en banc. 1980); Gough v. Perkowski, 694 F 2d 1140, 1142-4 (9 CA.1982); Duncan v. Merrill Lynch, 646 F 2d 1020 (5 CA.1981) cert. den. 454 US 895, 102 S Ct 394, 70 L Ed2d 211 (1981).

It should be at once apparent that an attorney has a constitutionally protected property interest both in the fees he can earn and in his professional reputation and clientele from which he cannot be deprived absent compelling reasons involving the public interest. Mr. Justice Jacobs in

In re Greenberg, 21 NJ 213, 223 (1956) quotes from Mr. Justice Fields' opinion for the U.S. Supreme Court in Bradley v. Fisher, 80 US 335, 355, 20 L Ed 646, 652 (1872):

> Admission as an attorney is not obtained without years of labor and study. The office which the party thus acquires is one of value, and often becomes the source of great honor and emolument to its possessor. To most persons who enter the profession, it is the means of support to themselves and their families.

And Justice Jacobs also quotes Chancellor Walker's opinion in In re Breidt & Lubetkin, 84 NJ Eq. 222,229 (Ch.1915) that the enjoyment of the status of attorney "brings him business and the means of a livelihood." That a lawyer cannot constitutionally be deprived of reasonable commercial advertising of his professional services is made clear in Bates v. State Bar of Arizona, 433 US 350, 97 S Ct 2691, 53 L Ed 2d 810 (1977) and that attempts to impose fee schedules upon

attorneys runs afoul of the Sherman Anti-trust Act is set forth in Goldfarb v. Virginia State Bar, 421 US 773, 95 S Ct 2004, 44 L Ed 2d 572 (1975). A lawyer has the same right as any other citizen to defend his pecuniary and professional interests against unwarranted, arbitrary and unreasonable deprivations and attacks. A law firm was even given the right to an interlocutory appeal from an entirely proper ruling that it had to continue to represent a litigant who could no longer afford to pay its fees. Kriegsman v. Kriegsman, 150 NJ Super 474, 479 (App. Div. 1977).

As important as his property interest is an attorney's liberty interest, likewise constitutionally protected, to be of service to other people, his community and the proper administration of justice. He has an indispensable role to play in "blowing the whistle" against

injustice. He is enjoined to carry out his professional and ethical duty "to improve not only the law but the administration of justice." In re Howell, 10 NJ 139, 140 (1952). Likewise he has an official duty to devote himself to his client, In re Callan, 66 NJ 401, 410 (1975), Justice Mountain concurring in an opinion joined by Justices Pashman and Clifford.

Mr. Justice Jackson said for the U.S. Supreme Court in Sacher v. United States, 343 US 1, 13, 72 S Ct 451, 96 L Ed 717, 726 (1952):

> But that there may be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of advocate on behalf of any person whatsoever.

In Maness v. Meyers, 419 US 449, 472, 95 S Ct 584, 42 L Ed 2d 574 (1975), Mr. Justice Stewart pointed out that for more than 40 years, the U.S. Supreme Court has

recognized a due process right to retained counsel in civil proceedings:

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore, of due process in the constitutional sense.

Conclusion: This matter is then ripe for summary disposition that the relief should be granted as a matter of law with costs and counsel fees.

Respectfully submitted,

Lewis C. Stanley

SUPERIOR COURT, CHANCERY DIV.
Docket No. C-788-87(L 49469-81
Transfer), Notice of Appeal
filed June 8, 1984

to: Kemp & Kemp, Attorneys for Defendants
on the Counterclaims
Box 2571, Trenton, N.J. 08619

TAKE NOTICE that Lewis C. Stanley appeals hereby to the Appellate Division from disqualification as attorney for counterclaimants in the interest of New Horizons Business Systems, Inc., a final judgment received from Kemp & Kemp May 1, 1984 having dismissed the counterclaims transferred to the Chancery Division after a purported voluntary dismissal of the complaint filed in the Law Division by defendants on the counterclaims.

Dated: June 7, 1984

Lewis C. Stanley

SUPERIOR COURT, CHANCERY DIV.
Docket No. C-788-81 (L 49469-81)
Notice of Appeal filed
June 8, 1984

To: Kemp & Kemp, Attorneys for Defendants
Box 2571, 2382 Whitehorse-Mercerville
Rd., Trenton, NJ 08619

TAKE NOTICE that George T. and Grace McMahon appeal hereby to the Appellate Division from all of an order received May 2, 1984 dismissing their counterclaims in the interests of New Horizons Business Systems, Inc., transferred to the Chancery Division after the purported voluntary dismissal of the complaint filed by defendants on the counterclaims in the Law Division; and from prior disqualification of their counsel in the interest of New Horizons Business Systems, Inc., and refusal to disqualify Kemp & Kemp.

Dated: June 7, 1984 George T. McMahon

Grace McMahon

APPELLATE DIVISION
Docket No. A_____
Notice of Motions filed July 11, 1984 and Letter Brief

To: Kemp & Kemp, Attorneys for Defendants on the Counterclaims, 2383 Whitehorse-Mercerville Rd., Mercerville, N.J. 08619

PLEASE TAKE NOTICE that pursuant to telephone notice to Richard Kemp of Kemp & Kemp, attorneys for defendants on the counterclaims, at 10:30 AM, July 10, 1984, the undersigned attorney shall apply emergently to the Honorable Warren Brody at 2 PM, Thursday, July 12, 1984 at his chambers, 155 Morris Ave., Springfield, N.J., for an Order in the proposed form annexed to:

A. Require assignment of a docket number herein;

B. Permit the undersigned attorney to act in the Appellate Division as counsel for Grace and George McMahon in the interest of New Horizons Business Systems, Inc.;

C. Extend for 45 days thereafter the time to perfect the appeals.

Movant shall rely upon a certified statement annexed hereto, an appendix of documents and a letter brief served and filed herewith.

Lewis C. Stanley

Certified Statement of Facts

Lewis C. Stanley pursuant to R.1:4-4(b) certifies:

1. This statement is made in support of a motion--among other things, some of which are emergent--for leave to act in the Appellate Division as counsel for Grace and George McMahon in the interests of New Horizons Business Systems, Inc., as they have requested.

[I had been retained orally by them pursuant to authorization by their equal partners John and Joan Aubert in January, 1980 to incorporate New Horizons as

promptly as possible because it had begun to do business and to represent the corporation as to any legal problems that might arise.]

2. While none of the reasons of "appearance" of conflict of interest with the Auberts given in the opinion below for disqualifying me in the trial court (M 1 a, et seq.) would appear applicable upon appeal (see the accompanying letter brief), I believe it appropriate to seek permission beforehand from this Court.

3. I filed a Notice of Appeal (M 5 a) as to the disqualification, June 8, 1984. Prior attempts to seek appellate review were dismissed as interlocutory.

4. The McMahons pro se also filed a Notice of Appeal (M 7 a) from a judgment entered April 24, 1984 (M 9 a).

5. Said judgment dismissed their counterclaims--transferred October 29, 1981 to Chancery from the Law Division--

against the Auberts for breach of the Auberts' fiduciary duty to New Horizons by diverting unto themselves and their alter ego corporation Sinkers business within the purposes for which New Horizons was organized at the instance of John Aubert.

6. The transfer (M 11a) preserved an Order entered in the Law Division May 5, 1981 requiring Aubert-Sinkers "to account for" all monies monthly to the McMahons received by them from a contract with the brokerage house of Merrill Lynch to produce a bond data book similar to that produced by New Horizons for the brokerage house of Janney, Montgomery, Scott (M 15 a).

7. Previous thereto, the Law Division Judge denied with prejudice a motion to disqualify me as attorney for the McMahons in the interest of New Horizons upon the ground of alleged appearance of conflict

with the Auberts (M 17 a). [All concerned had approved the very modest fee charged to and paid by New Horizons and the Certificate I filed as sole incorporator February 4, 1980. The purposes set forth therein were specifically adopted in the handwriting of John Aubert on a resolution he prepared April 4, 1980.]

8. The New Horizons claims asserted by the McMahons were transferred by the Law Division Judge when he reversed himself to allow "voluntary dismissal" of an Aubert-Sinkers complaint--scandalous and unethical on its face in naming New Horizons as a co-plaintiff and proceeding to make claims on behalf of Aubert-Sinkers hostile to New Horizons interests.

9. At the same time, he declined upon the ground of "mootness" to consider motions to strike the complaint for unclean hands and to sever claims of "conversion" asserted against me for deposit-

ing in the New Horizons bank for safe-keeping as New Horizons property against possible improper use by either of the parties of computer discs produced by Aubert in New Horizons headquarters on the New Horizons computer presumably for the Merrill Lynch contract in April, 1981. [I tried at the same time to bring all together to consider their duties of undivided loyalty to New Horizons pursuant to the New Jersey cases I mailed to all setting forth the uncompromising rigidity with which such fiduciary duties were enforced--the only response being the Aubert-Sinkers complaint that I had stolen their discs.]

10. The latter claims against me, reasserted in Chancery--again with the joinder of New Horizons which made blatant the conflict of interest with New Horizons by the attorney for Aubert-Sinkers--were severed when the Chancery Judge disquali-

fied me (M 19 a) and transferred back to the Law Division when the McMahon claims were dismissed April 24, 1984. (M 21a)

11. No docket numbers have as yet been received from the Clerk of the Appellate Division as to either the Notice of Appeal filed by me or the McMahons on June 8, 1984. Nor have I received any reply to a June 30, 1984 letter requesting the docket number from the Clerk (M 23 a). I had been waiting for the number to make the application to be permitted to honor the McMahon request.

12. Under these circumstances, it is impossible for either the McMahons or myself to know what applicable time frames for perfecting appeal may be.

13. Such times are therefore emergent matters requiring application to a Judge assigned for same to render a decision as to permission to act upon appeal as counsel for the McMahons in the New Horizons

interest, to require assignment of docket number and to extend time to file briefs, etc., for 45 days thereafter.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: July 10, 1984

Lewis C. Stanley

July 10, 1984

Honorable Warren Brody
Judge of the Appellate Division
155 Morris Avenue
Springfield, New Jersey

Re; Sinkers v. McMahon
Docket No. A -_____(C 788-81)
Letter Brief on Emergent Motion

Dear Judge Brody:

Two predicates were advanced by the Judge below for disqualifying me from representing the interests of New Horizons Business Systems, Inc., on behalf of the appellants McMahon:

1. Although there was no actual conflict of interest with their partners in New Horizons, the Auberts, since I had no contact with them,[1] there might be an

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[1]The Judge was asked, "Does your Honor agree that it is undisputed that I had no confidences from the Auberts?" She replied, "Yes. I don't see any--there is certainly no representation by counsel that there is any actual confidences exchanged." (T44-2[illegible] available for the Court.)

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adverse public impression as to an "appearance of conflict." It opines: "It is

important to understand that this does not relate to real conflict but to public apprehension of conflict."

[See however Opinion 462 of the N.J. Advisory Committee on Professional Ethics that the attorney must ethically serve the interests of the corporate entity for which he is retained over and above any personal interest of any of its officers or stockholders, specifically adopting ABA Ethical Consideration 5-18 which provides:

> A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally, a lawyer for an entity is requested by a stockholder, director, officer, employee, representative or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

[See further the definitive authority with respect to conflicts upon our Supreme Court has always relied, "Developments in the Law of Conflicts of Interest in the Legal Profession," 94 Harv. Law R. 1247-1503 (April, 1981). It holds that when anyone in the corporation is "clearly violating the fiduciary duties they owe

it, the corporate attorney not only must dissociate himself from the violation, but must actively oppose it." (p. 1336) Such attorney is "ethically bound to take active steps to oppose that breach." (p. 1352)[2]]

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[2]There cannot be a scintilla of doubt that the opinion below is quite inaccurate when it states there was a "stubborn refusal" to adhere to any ruling by Judge Dreier contrary to these holdings. Asked if he saw any conflict in representing the McMahons only insofar as they were asserting the interests of New Horizons, Judge Dreier replied (18-4 of a 1/8/82 Transcript which will likewise be available for this Court):

> It is not my function to respond to your questions as to whether in your mind you're representing the best interests of a corporation or not. That is between you and your clients, and is not for the Court to get into.

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2. Although everything this attorney did on behalf of New Horizons was a matter of written record and the McMahons from the first when the issue of conflict was raised before the Law Division saw no need for him to testify on their behalf as a witness--they refused to let him drop out of the case which appeared almost

over when the Auberts were ordered to account for the Merrill Lynch even though he warned them this was a "red herring" designed to distract attention from the treachery that is disloyalty to one's own corporate entity--he "should" be a witness on behalf of the McMahons.

[Of course, this is what Aubert-Sinkers want. But our Disciplinary Rules make the following quite clear, DR 5-102:

> (B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or believes that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.]

What is amply clear is that neither of the above two postulates should apply on appeal if it is to be at all meaningful. It was pointed out to the Court below time and again that the McMahons are without funds to retain another attorney to go through the rather incredible convolutions this case underwent.

The prejudice to them is severe while there can be no prejudice to Aubert-Sinkers since there was nothing obtained from them in any way that can be used against them other than their own admissions in this litigation.

It simply does not make sense to have two sets of briefs in this matter with the key revolving around the issue of whether the disqualification accorded with the rules of ethical conduct or violated them in a mythical "appearance" of conflict while there was actual obvious conflict between the attorney for Aubert-Sinkers and his designation of New Horizons as a co-plaintiff with interests antagonistic on their face to Aubert-Sinkers claims.

As a matter of judicial economy in a case already beset by too much paper and as a matter of economy and effort by all concerned, the undersigned attorney should

as a matter of justice on the merits be permitted to act as counsel for the McMahons in the interest of New Horizons on appeal.

It need not be belabored that both the McMahons and the undersigned attorney are entitled to a docket number and to an extension of time to perfect the appeals.

Respectfully submitted,

Lewis C. Stanley

APPELLATE DIVISION
Docket No. A-5039-83T3
Order filed July 12, 1984

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS: EMERGENT MOTION FOR ORDER PERMITTING LEWIS C. STANLEY, ESQ., TO REPRESENT APPELLANTS, AND TO EXTEND TIME TO PERFECT THIS APPEAL, DENIED.

FOR THE COURT:

WARREN BRODY, J.A.D.

APPELLATE DIVISION
Docket No. A-5041-83T3
Order filed July 12, 1984

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS: EMERGENT MOTION FOR ORDER PERMITTING LEWIS C. STANLEY, ESQ., TO REPRESENT APPELLANTS, DENIED.

SUPPLEMENTAL: This order is for informational purposes only. The motion was heard and denied under Docket No. A-5039-83T3.

FOR THE COURT:

WARREN BRODY, J.A.D.

Letter to Petitioner Attorney
from Client
Included in the Record below

Mr. Lewis C. Stanley
Attorney at Law
One Lemore Circle
Rocky Hill, New Jersey 08553

Dear Mr. Stanley:

Enclosed is a copy of the letter we have sent to the Appellate Court.

We have insufficient funds to retain a lawyer who does not have your duty to defend the interests of New Horizons, and therefore demands hourly fees we cannot afford.

Attorney Philip Rosenbach at a conference with me, attended by you on March 27th, agreed that there was a clear case of the Auberts' violation of their duty and responsibility to New Horizons. He further agreed to represent us on a contingency fee basis plus a retainer more than double that which you returned to us.

He appeared in court, as you did, on

March 28th at 1:30 pm. This was the time given by telephone from the Judge's office both to him and to me for a pre-trial conference to "narrow the issues," after the separate claims against you had been severed.

When he was told our claim had been dismissed the day before, he became (to quote him) "disenchanted" and because of the new added tangle, increased his demand for additional fees. We could not accept.

Accordingly, we are asking the court to put our claims on "hold," which will not prejudice anyone, until you appeal your disqualification.

We trust you will concur in this action.

Sincerely,

Grace McMahon

July 16, 1984

9 Johnson Drive
Belle Mead, New Jersey 08502
July 16, 1984

Ms. Elizabeth McLaughlin
Clerk, Appellate Division
Superior Court of New Jersey
PO Box CN 006
Trenton, NJ 08625

Dear Ms. McLaughlin:

We have received your "Notice of Docketing" and are overwhelmed by what has to be done, and do not fully understand.

We therefore respectfully request a stay of any action on our appeal until the appeal of disqualification of our attorney is completed.

Inasmuch as we do not have funds to hire another attorney, we sincerely feel that our constitutional rights would be violated if we were left without counsel.

Thank you for your consideration.

Sincerely,

George T. McMahon

Grace McMahon

SUPERIOR COURT, CHANCERY DIV.
Docket No. C-788-81
ORAL OPINION, pp. 27-45
Transcript of September 28, 1983

THE COURT: . . . we have an application by Mr. Kemp on behalf on his clients, a different application, and the application is for your disqualification as a result of the fact that you previously represented the Auberts and the McMahons in the formation of this corporation.

Now, of course, it is your view that that is not accurate, that you represent the corporate entity only. As I indicated to you in chambers, there is something that falls short of a totally accurate picture, because you represented the Auberts and the McMahons at least insofar as you carried out their wishes, fulfilled their wishes in incorporating New Horizons. And by your view, certainly, you did it totally in conformity with the wishes of the parties.

MR. STANLEY: That was only, that was my only duty to them.

THE COURT: That's right.

MR. STANLEY: My only duty.

THE COURT: But the fact that you had a limited obligation to them or your mandate as an attorney with respect to the Auberts and the McMahons was a limited kind as opposed to you will be my attorney forever for all purposes, the fact of the matter is that you did have a relationship as an attorney and client both with the McMahons and the Auberts.

This brings into play the disciplinary rules and certain ethics opinions and reported opinions of the New Jersey Supreme Court which are directly on point.

Now, the first ethics opinion which is relevant is Ethics Opinion 381 of 1978. In that case, an attorney was a reviewing attorney for a lending institution, and as a result of that he was one of these

approved attorneys. He had occasion to meet some people once and close for them. Several years later, he was then representing some kind of a financial institution and sought an opinion as to whether or not he could become engaged in a foreclosure with respect to the mortgage that came out of that closing. The Court held that, obviously--the Ethics Committee, I'm sorry, of the Supreme Court held that, obviously, an attorney-client relationship existed although it was truncated--it was only for the single occasion --and that it was clearly improper for the attorney--

MR STANLEY: Absolutely.

THE COURT: Clearly improper for the attorney to represent an adversary of his former client arising out of the same kind of a factual situation.

Similarly in Riordan v. Marlane (phonetic)--and this is probably the lat-

est opinion of our Supreme Court which is on point--the situation was this: And it is even more attenuated than the case that we have at bar. A young attorney was associated with the law firm, a large law firm in Newark, Carpenter, Bennett and Morrissey--

MR. STANLEY: That's the G.M. case where he defended G.M. and then prosecuted G.M. on a products liability case. I remember that.

THE COURT: I'm glad.

He leaves Carpenter, Bennett and Morrissey and joins a firm of young lawyers in another area. And a plaintiff with a plaintiff's case involving a GM product comes and asks the law firm to represent that plaintiff as against GM.

MR STANLEY: Can't do it.

THE COURT: And the Court held it was not proper even though it was not even an identical action that was involved. And

the Court laid out three separate areas that would be at issue in order to determine whether or not a person should be disqualified with respect to a person who was a former client. The three specifics are that, in fact, there was a prior attorney-client relationship; the second that there is some identical issue involved; and the third is the confidences issue. But the Court specifically dealt with the passing of confidences between a lawyer and his client this way and said, "If the matter is substantially related to the prior matter for which the lawyer was counsel to the adversary, then the Court will assume that confidential matters passed, notwithstanding any attorneys or parties declarations to the contrary, and the presumption of access to and knowledge of confidence will not be rebuttable. And the reason for that is that the basis for this opinion is not real conflict, but

the appearance of conflict to the public."

The GM case, in my estimation, sheds some light on the situation which is presently pending. Read in light of Ethics Opinion 391, which clearly establishes the nexus as the former attorney-client relationship, it seems clear to me that you formerly represented the Auberts--even though it was in the limited capacity of setting up this corporation--you represented both the Auberts and the McMahons. And as such, especially in connection with the litigation that the subject matter of which is the very corporate entity which you had occasion to create, that it is improper for you to represent one of the parties in this case, and that upon the application of the Auberts that I have the obligation, on the application of the Auberts, to see to it that you do not continue on in the case. It is not even a doubtful case in my estimation,

and I might say that if there is any doubt as to the propriety of the attorney's representation of a client, that has to be resolved in favor of the disqualification. I don't even think that it is, in fact, a doubtful case because of the prior representation and the identity of the issue.

Peripherally, we have had other questions raised in the case not the least of which is the question of your being a witness, and I frankly have to say if that had been the only issue, I was satisfied that just with what had passed on, I would not have disqualified you from continuing to represent Mrs. McMahon in this case. However, and in light of the fact, in my estimation, that the position that you are taking here is--this is a separate reason--is contrary to the special condition that was imposed upon you by Judge Dreier in representing the McMahons which

was that you were to represent them to the fullest, not just insofar as their interests coincided with your view of New Horizon's--

MR. STANLEY: He never said --

THE COURT: I am rendering an opinion. I am rendering an opinion.

It seems to me as well that even that special condition that he imposed is not being met by the nature of the representation that you have indicated that you are giving here today.

I think it is important also to note that the consent of your client or the interest of your client in being represented by an attorney of her own choosing is not the paramount consideration here, because it is well-established that a person's right to demand to be represented by an attorney has to be balanced against disqualification. And if there is disqualification because of what I believe to be

an ethical requirement, that request of your client to be represented by you is simply, it simply cannot be honored.

I have to say as well that, in my estimation--and this is really, I suppose, not anybody's fault--one of the reasons why this case is as enormous as it really is is because of the extraneous issues, the peripheral issues that really--although I have no doubt that you have undertaken splendid representation of the McMahons--have arisen as a result of this representation of the McMahons. I am not saying you have stood in the way of a settlement. I don't think, really, up to this point I have seen any real settlement negotiations anyway. But I think all of these papers that have been filed, all these motions, appeals have arisen to a great extent by virtue of the fact that you are representing the McMahons in this case, and it seems to me that practically,

separate and apart from the disqualification which clearly appears to me to emerge as a result of the opinions and the cases and the ethical standards, that the very practice, the point behind not having an attorney involved in this kind of a situation, it is very practically shown in this case why it really shouldn't take place.

I realize that at this point you probably would like to get some kind of relief from this opinion, and I assume that that will be next--

MR STANLEY: Are you addressing to me a question, Judge Long?

THE COURT: Yes, I --

MR STANLEY: You know very well that this ruling effectively deprives the McMahons of counsel.

THE COURT: Well --

MR STANLEY: It can be no question of that.

THE COURT: Let me stop you for a second.

MR. STANLEY: They can't do it. They cannot afford to pay what is a normal, reasonable fee. It would take a week or more just to unscramble this. Your Honor has now come forth with a ruling that is contrary to what two judges held --

THE COURT: No --

MR. STANLEY: -- contrary to what two judges held. They raised the issue of conflict.

THE COURT: Mr. Stanley, Mr. Stanley.

MR. STANLEY: Yes, Judge Long?

THE COURT: Okay, go ahead.

MR. STANLEY: I'm sorry.

THE COURT: Just go ahead.

MR. STANLEY: They raised the issue of alleged conflict of interest before Judge Gaynor. Denied. They raised the issue before Judge Dreier. In no way did he sustain that contention. They asked for leave

to appeal on the cross appeal. In no way was it sustained.

Now, Judge, we have a very--and you are talking about the technicalities--this case abounds with them. Now, there is another, quite apart from the technicality, the McMahons, it is obviously unfair and a denial of due process to them. You are effectively depriving them of counsel. They have no money to retain other counsel. They can't pay a normal fee of $75 an hour to anybody who could possibly handle their case. But there is, again, the technicalities that have been raised by all this blithering nonsense in a case that was so obviously clearly a violation of fiduciary duty which your Honor is ignoring.

And I had cross motions which your Honor has not passed upon, two cross motions.

THE COURT: The cross motions --

MR. STANLEY: Yes.

THE COURT: The one cross motion is the removal of Mr. Kemp because of conflict between the Auberts and New Horizon's --

MR. STANLEY: No, because he said, he represented he represented New Horizon's and made a claim adverse to New Horizons.

THE COURT: And Judge Dreier, I believe, in the transcript that was pointed out this morning said specifically there was no basis for this in law or fact.

MR. STANLEY: Well, this is, this is no reason. There isn't anything that he can rely on on its face. It is unethical and it creates a conflict of interest.

THE COURT: I think it is an important fact here also that Judge Dreier, there are several references in all these transcripts, and this is the way I view it, the fact of the matter is that both parties

to this case believe that they are bringing forward the interests of New Horizons.

MR. STANLEY: How can that be? They are claiming that the property is theirs. In the face of the fact, in the face of the fact that Judge Dreier made a specific finding that they are fiduciaries.

THE COURT: As I indicated previously

MR. STANLEY: This is a claim adverse to New Horizon's, Judge Long. I respectfully say that you cannot play with words. This is a claim adverse to the interests of New Horizon's, New Horizon's known by them to claimant as their property, as New Horizon's property.

THE COURT: As Judge Dreier indicated in the transcript of December 4, Mr. Stanley, I am sure the plaintiffs in Sinkers also feel they are acting in the corporation's best interest.

MR STANLEY: How, by claiming the property is theirs? How can that be, this

catch 22? You are acting in the interest of New Horizon by saying the property is not New Horizon's, it is mine? I mean, this is what I am faced with. I can't understand the power to abuse language. How can you protect the interest of New Horizons by saying it is not New Horizon's property, it is mine? This is catch 22. This is depriving language of its rationality. This is abuse of power when language is deprived of its normal meaning.

THE COURT: But your assumption is just because it might turn out--they are asking for certain property from New Horizon's, that automatically is contrary to New Horizon's interests.

MR. STANLEY: Of course.

THE COURT: It isn't contrary to New Horizon's interest if it is their own property.

MR. STANLEY: Yes, it is. Yes, it is, because if New Horizon's has a legitimate

basis for claiming it, then what is their legitimate basis, the finding that they are fiduciaries?

THE COURT: Okay.

MR. STANLEY: If they are fiduciaries and the products of a bond data book which New Horizon's made is taken away from them and diverted to their own profits, they are violating fiduciary duty. Nothing could be clearer than that. And it is the attempt to obscure these issues that becomes so heinous. Your Honor is denying my motion?

THE COURT: Yes.

MR. STANLEY: That they be disqualified?

THE COURT: Yes.

MR. STANLEY: Because they said that they represent New Horizon's and they claim adversely to New Horizon's?

THE COURT: Right, yes.

MR. STANLEY: Your Honor is denying

that motion?

THE COURT: Well, basically Judge Dreier denied that motion.

MR. STANLEY: Well, he gave no reasons. I mean, saying that there is no basis in the law, in the fact, on its face, there is a basis.

THE COURT: Now, the other motion--

MR. STANLEY: This is an abuse of power.

THE COURT: -- is a motion to strike all claims as a result of the Unclean Hands Doctrine. As Judge Dreier did in this case--he didn't do it overtly, but implicitly--I will deny that motion on the basis of the papers that have been filed that at this point unclean hands have been established, but I do not believe that there is any reason why during the course of these proceedings or at the end of the trial this motion should not be remade based upon the evidence which

is adduced as far as that issue is concerned.

MR. STANLEY: The evidence has been filed with the Court, Judge Long. The evidence is that they say they were suffering irreparable injury, they needed the discs. The evidence is clearly set forth in my motions that he admitted he didn't need the discs, the book could be produced without them. There was no delay. Any delay that was occasioned was occasioned by Merrill Lynch itself. This is unclean hands.

THE COURT: I am not satisfied that is unclean hands, and therefore, I am denying your motion. Okay.

MR. STANLEY: Now, Judge, we have the problem--is this a final judgment or is it interlocutory?

THE COURT: It is interlocutory, but it should not be treated--I am sure it will not be treated as an ordinary inter-

locutory appeal.

MR. STANLEY: Will your Honor specifically say that this should not be treated as an interlocutory appeal so I do not get into this business of the technicalities with which I have been fundamentally faced? Your Honor knows that the McMahons are not in a position to proceed.

THE COURT: I do want to say this--this is another point I forgot to make for the record. I said this to you in chambers, and I believe this is so. I do not believe that if you get down to the facts of this case that this is a very complicated case.

MR. STANLEY: The facts have (been) obscured--

THE COURT: If you throw out of this case all the things that are not dealing with the issues in the case but with peripheral matters that have been raised as a result of various conflicts that have come up during the course of the case, it is

not a very difficult case. All the discovery is completed, and I do not consider the McMahons can have as much time as they want to find another lawyer or decide how they want to proceed, and I don't consider it to be--this is not an antitrust case, in other words. This is a case that a lawyer, a smart lawyer can sit down and go through factually without too much difficulty. And I don't see this as being a really enormous deal as far as getting other counsel is concerned.

MR. STANLEY: They don't have the money for it. G.M. Printing showed a loss of $10,000 last year. They don't have the funds. And the only way that they can get counsel--and no counsel is going to be willing to take this on a contingency basis other than one such as I who had a moral and professional obligation to represent their interests consistent with the interests of New Horizon's. The Court's

imprimatur on the validity on contingencies is set out in the Disciplinary Rules, and I say to your Honor that you are violating due process and the McMahons' right to counsel of their own choosing. In no way could the Auberts be prejudiced by my being counsel. They authorized the McMahons to contact me for one purpose. I received no confidences from them. They made no such--they made no such claim. There is no appearance of impropriety because I was engaged for only one specific purpose. Nothing that I could possibly do can alter the basic situation that my employment by all these people was never as separate individuals. Composite. Therefore, I did not represent them. There is no attorney-client relationship between them and any individuals. The rulings that your Honor has made are completely inapposite because I have not represented these people in any individual

capacity. I represented them as a collective, as a collective entity. And the fact is it is undisputed--does your Honor agree it is undisputed that I had no confidences from the Auberts? Is that--does your Honor agree?

THE COURT: Yes. I don't see any--there certainly is no representation by counsel that there is any actual confidence exchanged.

MR. STANLEY: Your Honor is not willing to accept the representation that the McMahons are without funds to retain counsel?

THE COURT: It wouldn't make any difference whether they were or weren't. You are either absolutely barred or you are not upon their application. If you are, you are no matter what else is involved. If you are not and if that's wrong, then you will be back.

MR STANLEY: Your Honor is adjourning

this matter indefinitely?

THE COURT: Until have an opportunity to carry out your remedies as you see fit.

SUPERIOR COURT, CHANCERY DIV.
Docket No. C-788-81
Order Denying Stay filed
February 3, 1984

This matter being opened to the Court upon application to stay proceedings herein pending determination of the Appellate Division upon applications for review and good cause appearing, it is on this 3 day of February, 1984

ORDERED that a stay of proceedings in this Court pending review by the Appellate Division be and is hereby denied.

VIRGINIA A. LONG, J.S.C.

SUPERIOR COURT, CHANCERY DIV.
Docket No. C-788-81
Letter Opinion, undated, received November 13, 1983, expanding Oral Opinion

Lewis C. Stanley, Esq.
1 Lemore Circle
Rocky Hill, New Jersey 08552

Richard D. Kemp, Esq.
Kemp and Kemp
P.O. Box 149
Station Square
Belle Mead, New Jersey 08502

LETTER OPINION

Re: Sinkers Inc. v. Stanley
Dkt. No.C788-81 -
L-49469-80

Gentlemen:

This letter will expand upon the reasons I expressed in an oral opinion ordering disqualification of Lewis Stanley (hereinafter Stanley) as counsel for the defendants in this case. In 1980 Stanley formed a corporation on behalf of Mr. and Mrs. George McMahon and Mr. and Mrs. John Aubert (hereinafter McMahon and Aubert) to be known as "New Horizons". A dispute developed between the McMahons and the Auberts

with respect to the scope of corporate activities, bringing into question among other things, the viability of the purposes expressed in the corporate charter. Stanley became embroiled in the dispute as a result of what he viewed as his obligation to the corporate entity. Litigation ensued between the parties in which Stanley was named a party defendant on charges by the Auberts including conversion and conspiracy to convert property, breach of attorney's responsibility, negligence in forming New Horizons and advising the Auberts with respect to the corporation. Stanley undertook to represent the McMahons and himself in the litigation.

Stanley's representation of the McMahons has always been in issue. In 1981 Judge Gaynor ruled that that representation was not in violation of the disciplinary rules notwithstanding Stan-

former attorney client relationship rendered improper the representation of the financial institution. In my estimation, our case is governed by the aforementioned principles. To the public (not to mention the Auberts), Stanley's representation of the McMahons against their co-incorporators and his former client, the Auberts, appears quite improper and should not be allowed to continue.

There are other important reasons which also point to this conclusion. The first is that Stanley "should" be a witness in this case. And, in truth, he "should" be a witness on behalf of his own client. The fact that he and his client have certified that they will not under any circumstances use him as a witness is not acceptable from several standpoints. First, it is the kind of effort to manipulate litigation which was clearly condemned in Reardon v. Marlayne, 83 N.J.

ley's prior representation of the Auberts. In December 1982 Judge Dreier reconsidered Judge Gaynor's decision on disqualification and barred Stanley from representing the McMahons or the corporation. In January 1983 Judge Dreier reconsidered his own disqualification of Stanley and reinstated him as counsel on the condition that he represent only the McMahons and not the corporation. Stanley argued to Judge Dreier that he wished only to represent the McMahons to the extent that their interests coincided with that of New Horizons. Judge Dreier specifically rejected this view, expressing the opinion that both sides in the case viewed their positions as in accord with New Horizons' interests (T12, January 8, 1982) and implicitly that it was not for Stanley to compromise his full allegiance to the McMahons by deciding to represent them only to the extent that he viewed their

interests as identical to that of the corporation. The court went on to note that: "You should represent yourself and McMahon with all of the diligence and all of the ability that you, through your years of experience, can bring to bear to represent their interests. ... You are not representing the corporation at this time." T17-7 to 11: T17-22 to 23.

The present controversy arose as a result of a motion by the Auberts' counsel reasserting that Stanley is violating the disciplinary rules by representing the adversary (the McMahons) of a former client (the Auberts) with respect to a matter on which he rendered the former client representation. Alternatively, he argues that Mr. Stanley is an essential witness in the case who "ought" to be called by the Auberts and that as such, he should not be representing the McMahons. Both Stanley and the McMahons have filed certifications

indicating that Stanley will not, under any circumstances, be called as a witness. Notwithstanding the conditions imposed by Judge Dreier, Stanley has again taken the position that he will only represent the McMahons to the extent that their interests coincide with the interests of New Horizons to which he says he owes his full allegiance. Because I believe that Stanley has failed to adhere to the condition imposed by Judge Dreier, I have agreed to rehear the disqualification motions.

Without regard to the practical difficulties which have resulted from Stanley's representation of the McMahons, I believe that there are serious ethical problems with that representation on its face. In this connection, I have reviewed the disciplinary rules and opinions and a recent decision of the Supreme Court on this subject. What we are dealing with

here is a case in which Stanley represented both the McMahons and the Auberts in forming New Horizons, and is now representing the McMahons against his former clients the Auberts in a litigation involving the very subject matter of his prior representation. In the more attenuated situation presented in Reardon v. Marlayne, 83 N.J. 460 (1980) in which plaintiff's attorney had formerly been an associate in a law firm representing the defendant in the present suit, the court reiterated the well established rule that an attorney may not appear against a former client in the same litigation in which he previously provided representation. The court went on to hold that the attorney could not represent an interest in new litigation adverse to the interest of his former client if the subject of the new litigation is the same or substantially similar to the interest involved in the

prior representation. While prior litigation is not involved here, the subject matter of this law suit is identical to the subject matter of Stanley's prior representation of the Auberts.--the nature of the corporate undertaking. On its face, this raises an appearance of impropriety. The fact that the Auberts do not allege an actual violation of their confidences does not change the result. For as the Supreme Court noted in Reardon, where the matters in issue are substantially similar to those involved in the prior representation or where there is an appearance of impropriety, there is an irrebuttable presumption of access to and knowledge of confidences 83 N.J. at 473. It is important to understand that this does not relate to real conflict but to the public apprehension of conflict. In Perillo v. The Advisory Committee on Professional Ethics, 83 N.J. 366 (1980) the Supreme

Court observed in this connection that:

> The vantage from which such "appearance" must be evaluated is not that of the attorney involved, but rather is that of the public. In re Opinion No. 415, supra, 81 N.J. at 325; see In re Wilson, 81 N.J. 451, 476 (1979). "Thus it is that sometimes an attorney, guiltless in any actual sense, nevertheless is required to stand aside for the sake of public confidence in the probity of the administrative of justice." State v. Rizzo, 69 N.J. 28, 39 (1975); accord, In re Opinion No. 415, supra 81 N.J. at 323."

The Supreme Court Advisory Committee on Professional Ethics rendered an opinion in accord with this conclusion in Opinion 391, 101 N.J.L.J. 209 (1978). The case involves the question of whether an attorney who closed on property for a couple as a reviewing attorney for a lending institution (a single isolated transaction) may later represent a financial institution in a foreclosure action with respect to the property. According to the opinion and notwithstanding the isolated nature of the transaction and the innocuous information passed between them, the

468-469, n. 1. Second and more troubling is Stanley's representation on the record that his client does not "need" him as a witness since he intends to prove the case by documentary evidence and "out of the mouths of defendants." There is no question in my mind but that this litigation posture is solely based upon Stanley's interest in remaining as counsel and not necessarily on what would ordinarily be the appropriate course of this litigation. If Stanley had stayed out of the case from the beginning which would have been the appropriate course of action, he would be available to each side at this point as a neutral witness. Instead, the Auberts, his former clients, are in the position of having to call their adversary's lawyer to testify. This enhances the problem of the appearance of impropriety and shakes the confidence of the Auberts and the public in the inte-

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grity of the legal profession. Moreover, this is not a case in which an attorney is surprised during the course of litigation by the fact that he might be called as a witness. Stanley had to have known from the inception of this case that he would naturally and probably be called. Thus, the provisions of DR 5-102 which apply to a lawyer "learning" that he might be a witness after undertaking employment do not apply. In fact, it is DR 5-101 which is applicable. That rule directs that Stanley should not have accepted this employment in the first place. He incorporated the McMahons and the Auberts; only he knows which of the specific words in the corporate purposes were supplied by the parties; and he seized property at issue in this suit which seizure forms the basis of a conspiracy and conversion charge against the McMahons.* The exact circum-

---

* All damage claims against Stanley

himself have been severed for jury trial in the Law Division at the request of the parties.

---

stances surrounding all of these happenings are peculiarly within Stanley's ken. He knew or should have known on the first day of this case that DR 5-101 required him to decline this employment.

Complicating matters is Stanley's flat refusal to adhere to the condition imposed by Judge Dreier as to his continuing in this case. As has been noted, Stanley insists that he will only represent the McMahons to the extent that their interest coincides with that of New Horizons. Even the McMahons' purported consent to this state of affairs is a problem. For while it may seem to them at this point that they have no interest in this case other than that of New Horizons, as lay persons they are not in a position to gauge whether this posture will be

appropriate as this litigation begins to unfold. Accordingly, they are committing themselves in my estimation to less than the full allegiance of their counsel which cannot be allowed.

Finally it should be noted that this is a very uncomplicated file involving few facts, few witnesses and several straight forward legal issues. Nothing in the case is hard to deal with except the relationship between the parties which is dark with emotion. The case is uncomplicated enough that an ordinary attorney could prepare it for trial in much less than a week. In this regard it is important not to be misled by the size of this file which contains an enormous amount of material reflecting the animosity between the parties and counsel. In fairness this is not all due to Stanley but many of the overwhelming number of papers in this case are directly connected

with problems arising either directly or indirectly out of Stanley's representation of the McMahons. The point of all this is that the McMahons could easily obtain other, effective representation in this case notwithstanding this order of disqualification.

In closing, it should be noted that Mr. Stanley is an excellent lawyer who has represented his clients so far to the best of his ability and in accordance with his responsibilities as he saw them. However, he should not have accepted this employment at the outset and his stubborn refusal to adhere to Judge Dreier's order left this court with no choice other than disqualification.

Very truly yours,

Virginia Long

SUPERIOR COURT, CHANCERY DIV.
Docket No. C-788-81
Notice of Pretrial Conference,
dated March 5, 1984 in envelope
postmarked March 13, 1984,
received March 15, 1984

To: Kemp and Kemp, Esqs.
P.O. Box 149
Station Square
Belle Mead, N.J. 08502

Mr. and Mrs. George McMahon
c/o GM Printing
US Highway 206
Princeton, New Jersey

Gentlemen:

TAKE NOTICE that the above entitled matter has been set down for pretrial conference before the Superior Court of New Jersey, Chancery Division, Fifth Floor of the Mercer County Court House, Trenton, N.J. on Tuesday, March 20, 1984 at 1:30 p.m.

* * *

Applications for adjournment are to be made within 10 days from receipt of this notice and no adjournment shall be

granted thereafter without appearance in court and good cause shown.

* * *

VIRGINIA A. LONG, J.S.C.

SUPERIOR COURT, CHANCERY DIV.
Docket No. C-788-81
Letter Decision dated March 28, 1984 in an envelope postmarked April 3, 1984 received April 5, 1984; McMahons' letter to the Court and reply

Kemp and Kemp
P.O. Box 149
Station Square
Belle Mead, NJ 08502

Mr. and Mrs. George McMahon
P.O. Box 312
Rocky Hill, New Jersey 08553

Re: Sinkers v. Stanley-C788-81

Dear Sirs and Madam:

This letter will confirm the reasons underpinning my decision in this matter. First, I have dismissed all claims filed by or on behalf of the McMahons due to their absolute refusal to appear for the trial of this matter on March 27, 1984 after they had been granted a series of adjournments leading up to that date. Indeed, the McMahons did not even request a further adjournment of the March 27th trial but advised the court of their in-

tention not to appear, suggesting that if their presence was required, the Court could send the sheriff for them. This attitude, coupled with their refusal to appear and prosecute their claims justifies the dismissal.

Second, as previously ordered, all damage claims by the Auberts against Lewis Stanley have been severed and transferred to the Superior Court, Law Division, Somerset County for trial, with the consent of the parties.

Third, I find that the history of this case including all of the affidavits on file and the testimony taken of Mr. Aubert on the 27th clearly establishes that the McMahons and the Auberts are so divided in voting power that between 1981 and the present they have been unable to hold annual meetings, or to elect directors or successor directors, or to effect any action respecting the management of the

corporation's affairs. Accordingly, I have ordered that the corporation be dissolved, the requirements of N.J.S.A. 14A:12-7(1)(a) and (b) having been met. A certificate of dissolution shall be filed with the Secretary of State under N.J.S.A. 14A:12-2 et seq. Pursuant to N.J.S.A. 14A:12-9, the dissolved corporation may continue to wind up its affairs by collecting its assets, paying its liabilities and taking such actions toward liquidation as are required. Upon appraisal and sale of remaining assets, after payment of liabilities, the proceeds shall be divided equally between the McMahons and the Auberts.

Save one, all other claims by the Auberts against the McMahon s have been withdrawn based on the dismissal of the McMahon's claims. What remains is a request by the Auberts for counsel fees. Based upon the facts of this case, there

is neither a statutory nor a regulatory basis for the assessment of such fees. Accordingly, that application is denied.

Please submit an appropriate order.

Very truly yours,

Virginia Long, J.S.C.

The Honorable Virginia Long, J.S.C.
Superior Court of New Jersey
Chancery Division
Mercer County Courthouse
Trenton, N.J. 08650

Your Honor:

This is in response to your letter of March 28th (postmarked April 3rd and received April 5th) relative to the Sinkers v. Stanley - C788-81 case.

Forgive us for the delay in answering. We were so shocked and emotionally upset by your distortion of the truth in the first paragraph, that it has taken all this while to face the matter objectively.

We wish here and now to set the record straight.

1. Your second sentence: "I have dismissed all claims filed by or on behalf of the McMahons due to their absolute refusal to appear for the trial of this matter on March 27, 1984 after they had been granted a series of adjournments leading up to that date."

a. We did NOT refuse to appear. The fact is that we were advised by your office (by Joan Noonan) that a Pre-Trial Hearing (not a Trial) was to be

held on Wednesday, March 28th. This was also the information provided by your office to our attorney on Monday afternoon, March 19th, so it is unlikely that it is a misunderstanding on our part.

b. Our legal counsel appeared at the time and day that your office advised him to appear (Wednesday, the 28th) only to be told that the hearing was held the day before. He then requested to see you to discuss the matter, but you refused.

c. We did not advise the court "of our intention not to appear." Here again the facts are completely distorted. The facts are as follows:

(1) You deprived us of counsel by an earlier order.

(2) We were alone and frightened by the awesome and mysterious power of the Judicial System.

(3) Mrs. McMahon called your office and spoke to a Joan Noonan asking questions, seeking information about a situation in which we are very unknowledgeable. Mrs. McMahon, in confidence, asked "if we did not appear would they send the sheriff after us." Now the innocent question has been turned around by your office to mean "That if their presence was required, the Court could send the sheriff for them."

Thank you for your time in reading this letter. We think it is important because, in our opinion, truth, honor and

justice have been dealt a defeat in this case.

We would appreciate hearing from you.

Sincerely,

George T. McMahon

Grace McMahon

April 16, 1984

Mr. and Mrs. George T. McMahon
9 Johnson Drive
Belle Mead, New Jersey 08502

Re: Sinkers v. Stanley C788-81

Dear Mr. and Mrs. McMahon:

I am in receipt of your letter of April 12, 1984.

If you wish to set aside the judgment, a motion for such relief must be filed and your adversary given the opportunity to respond pursuant to Rule 4:50-1.

Very truly yours,

Virginia Long, J.S.C.

cc: Kemp and Kemp

Letter, Attorney Rosenbach to Stanley, April 11, 1984 (P401a of Appendix on Appeal to Appellate Division)

Lewis C. Stanley, Esq.
1 Lemore Circle
Rocky Hill, New Jersey 08553

Re: Sinkers v. Stanley

Dear Lew:

I am sending you this letter at your request to memorialize my recollection of events leading to our attendance at a pre-trial conference on March 28, 1984, in connection with the above matter. My recollection is as follows:

On or about March 15, you or Craig Becker telephoned me to advise me of a forthcoming pre-trial conference.

On March 16, I telephoned the chambers of Judge Long, and was advised that the conference had been adjourned without date, because Judge Long was going to be on vacation.

On March 19, you telephoned me and

advised me that you had been told by Grace McMahon that the conference was scheduled for 1:30 p.m. on March 28.

On March 20, I confirmed this information by a telephone call to Ms. Newman at Judge Long's chambers.

Upon arrival at Judge Long's chambers on March 28, where I met you, I was advised that the conference had been scheduled for the previous day.

I have notes to my conversations on March 19 and March 20, which clearly show the scheduled conference date as March 28, 1984 at 1:30 p.m. I did not attempt to confirm this date by telephone with the Court before March 28.

Very truly yours,

Philip Rosenbach

SUPERIOR COURT, CHANCERY DIV.
Docket No. C-788-81
Order and Judgment filed
April 24, 1984

This matter coming before the Court for trial on March 27, 1984 and the Defendants, Grace McMahon and George McMahon and G.M. Printing Services, Inc. failing and refusing the appear and Richard D. Kemp, Esquire, appearing on behalf of the Plaintiffs, Sinkers, Inc., John Aubert and Joan Aubert and Plaintiffs having withdrawn their claims against Defendants, Grace McMahon, George McMahon and G.M. Printing Services, Inc., without prejudice as stated in the record, and all damage claims against Defendant, Lewis C. Stanley, having been previously severed and transferred to the Superior Court - Law Division, Somerset County, for trial with the consent of the parties, it is now

ORDERED AND ADJUDGED on this 24th

day of April, 1984, as follows:

(1) The claims of the Defendants, Grace McMahon, George McMahon, and G.M. Printing Services, Inc. are hereby dismissed with prejudice.

(2) The withdrawal of Plaintiff's claims against Defendants, Grace McMahon, George McMahon, and G.M. Printing Services, Inc. without prejudice, as set forth in the record in open Court is hereby approved.

(3) The corporation known as New Horizons Business Systems, Inc. is hereby dissolved pursuant to NJSA 14A:12-7 (1) (a) and (b) and the corporation shall file a certificate of dissolution with the Secretary of State under NJSA 14A:12-2 et. seq.

(4) New Horizons Business Systems, Inc. shall wind up its affairs by collecting its assets, paying its liabilities and taking such actions toward liquidation as

are required by N.J.S.A. 14A:12-9.

(5) Upon appraisal and sale of remaining assets, after payment of liabilities, the proceeds shall be divided equally between Defendants Grace McMahon and George McMahon and Plaintiffs, John Aubert and Joan Aubert.

(6) Plaintiffs request for counsel fees on this application is denied.

Virginia A. Long, J.S.C.

Letter, April 27, 1981, of
Stanley to Auberts and McMahons

Dear Auberts and McMahons:

This is written to all of you primarily because I have for each couple the same friendship and good will and as an attorney the same responsibility with respect to the business enterprise you formed as equal partners, I acting as incorporator.

It is prompted also by the fact that I was served late Friday afternoon, April 24 with a rather curious and in some ways quite welcome "Notice" from Joan -- not from any attorney.

In this "Notice," Joan presumes to issue orders as President of New Horizons to George as Vice President and Grace as Treasurer with respect, among other things to which I will later address myself, to certain computer discs which I have deposited for safekeeping as the property

of New Horizons with the Montgomery National Bank under seal. A copy of the receipt I obtained is enclosed.

I explained to the bank officers that as attorney for New Horizons, I considered these discs labelled "Aubert" and "Sinkers" to be the property of New Horizons but that I had had indications from John's attorney, a Mr. Kemp that he considered them the personal property of John. Further that they could be released either by a signed agreement between all of you or by court order.

I must assume from this "Notice" in which Joan purports as president of New Horizons to issue "orders" as to the discs that John now makes no claim that they are either his property or the property of "Sinkers." I have since learned that the Sinkers corporation was organized in October, 1980 by the Auberts solely for "any business purpose authorized by law."

However if it was indeed to do business that was within the scope of New Horizon's purposes or to compete with it, it was an illegal action in violation of the duty he owes to the McMahons and to New Horizons.

The big question in mind--and that is why I took possession of the discs--is whether John is or is not aware of his duty--and indeed the duty of each partner couple to the other--and that some of his actions are terribly violative of that duty. The McMahons were not aware of it although they thought what he was doing seemed unfair but they believed he had much more experience than they and assumed the actions were within the law.

I took possession of the discs so that they could not be used by any of you to the disadvantage of the other. I made that clear to John the night I took them and to his attorney Mr. Kemp the

next day when I called him to seek a meeting of all concerned with Mr. Kemp and myself to set forth the established New Jersey law with respect to the fiduciary duties you each have to the other with respect to business and property that belongs to New Horizons.

This Mr. Kemp was abusive and insulting and I have no obligation to deal with or speak to him further. I am so informing the senior partner of his firm by copy of this letter.

Although such a meeting as I proposed could in no way hurt and might very well help all concerned, Kemp when he was not ranting and raving and threatening and insulting me, said he could not care a whit about John's fiduciary obligations, would not agree to a meeting and was concerned only with whether I would return the discs. I told him of course I would but only to New Horizons to be dealt with

as New Horizons' property.

Kemp in his own inimitable fashion refused, saying the discs belonged only to John and that he, Kemp and not I, was the attorney for New Horizons. Of course he paid not the slightest attention when I tried over his screaming interruptions to point out that if that were so, he was taking a position harmful to his New Horizons client while obviously I was seeking only to safeguard the interests of New Horizons and not hurting anyone by placing the discs in neutral and safe custody temporarily.

And so I continue to do and that is why in a limited sense I welcome the "Notice" by Joan although it is in most other ways way off base insofar as the law is concerned. I still ask for the meeting to explore that law--not my notions but what the cases say clearly and plainly for all to see. I am quite

willing for any member of the firm other than Kemp to attend such meeting provided he or she conducts himself as an attorney not an abusive child.

Now what is the history of my relations with you?

My wife was teacher and friend of the children of each and that is how I came to know the McMahons and to assist them on two occasions with their small successful printing business known as GM Printing in which they both work. They are simple, honest hard-working people.

I am not very familiar or intimate with them or the Auberts. It is John whom I know best and to whom I am probably closest as the result of long shared ordeals and some moments of fun and games as commuters on the Reading.

I believe John would acknowledge that I saved him from a costly misadventure

when he solicited my advice some years ago as to a scheme to sell aerial photos of residences.

My relationship, then, was such that there would be no legal or professional inhibition in representing interests adverse to any of yours in matters that had no connection with things as to which I had helped. Nevertheless on a personal basis, I would have refused to do so.

That was the situation when you folks came to me in February, 1980 to organize as equal partners the joint venture known as the New Horizons corporation. That created a reciprocal duty of the utmost undivided loyalty that each of you have to the other with respect to such business enterprise. It also created a professional obligation on my part with respect to such duties incumbent upon all of you.

If after informing all of you--and that's what I wanted to do and to be sure

of when I proposed a meeting because I was quite frankly shocked and bitterly disappointed with what John was trying to do--of such duties, rights and expectations, any of you knowingly and deliberately still tried to secure personal advantage at the expense of the other in connection with transactions that properly belong to the enterprise, I would not only be free but it would be and is my duty--both professionally and personally--to resist such willful misconduct vigorously and seek redress for the victimized parties against any attempted violations of your fiduciary obligations to each other.

The following is my understanding of the overall picture (and if I do not know all the facts, I am quite ready to be educated as to them as I tried unsuccessfully to tell Kemp when he said I didn't know all the facts but refused to meet to set

me straight):

Early last year John sought out the McMahons and asked them to become partners with the Auberts in a venture that involved buying a small computer, both the hardware and software, to produce and keep updated business information, most immediately data as to bonds, and make it easily available in printed form and eventually for quick telephonic retrieval. He indicated there would be little or no profit the first year but thereafter the sums to be realized would be very substantial in relation to the expense and effort and that he would be able with his contacts and experience in the brokerage business to market the product readily.

John obviously was and is the dominant and dominating figure upon whom the McMahons would necessarily have to rely and trust in the enterprise with respect to dealings with third parties, clients and customers.

I acted as incorporator for a very modest fee and was told by Grace that all agreed I would be counsel to the business and would be called upon for legal advice if need be. I was not called until last Tuesday night, April 21 by the McMahons.

What had happened in the interim according to them was that jointly you had purchased a small computer as well as a program for input of bond data assembled by John for production of a bond book for a brokerage house in which John worked, Janney Montgomery Scott. Janney paid $6,500 for it and turned out to sell it for many times that amount. That was the only activity for New Horizons and its return for 1980 shows taxable income of $808.39 without any payments as officers to anyone. In August, the McMahons expended more than $1,000 to build a special room for the computer (GM's office was always

the principal place of business for New Horizons) and charged neither for this nor the space, light, heat, utilities, etc., but as slight recompense was allowed to use the computer for about 5 hours a week for GM payroll, etc.

When John sought some greater recompense from Janney for the next year's book, there was apparently a falling out and recently John resigned and solicited other houses. He has apparently been able, according to the McMahons, to negotiate a contract for some sum to produce the book for Merrill Lynch. It is not known if there are any other contracts. (Kemp referred in his diatribe to me to contracts in the plural rather than the singular that John had.) I believe that is incumbent upon the Auberts to produce copies of all contracts John may have negotiated that could be performed by New Horizons--they would be in any event

required to be produced by a court.

I am enclosing herewith samples of the very vigorous law with respect to the duties you owe each other and to New Horizons. There are of course many other cases but the material enclosed should suffice.

Obviously everyone concerned wants such contracts as John negotiated to be performed since it is my position that the settled law requires that they redound this year and all successive years that it is marketed to the benefit of New Horizons in whic h you are equal partners. It matters little whether you consider yourselves simply partners or equal directors in a corporate entity. The duties would be the same and that is why I have enclosed recaps of the law with respect to directors. However there is no denying the fact that no formal meeting were ever held and no by-laws ever adopted and the

so-called Notice by Joan invoking non-existent by-laws is of course quite beside the point. The articles of incorporation govern and so does the understanding and intention that you be equal partners.

I therefore propose a meeting to clear the air--you are all still friendly and hopefully John will recognize the law for what it is and fulfill his obligations to the enterprise. The discs should be returned to the corporate or partnership headquarters to be worked on as enterprise property during normal business hours and in emergencies by mutual consent at other hours. The Auberts should of course pledge not to compete either directly or indirectly with the New Horizons enterprise and to bring all business that can be performed by New Horizons to it as well as any copyrights, patents, licenses, etc. John should realize and agree that he cannot enter into contracts which give anybody exclusive

rights to the product--either Janney or Merrill Lynch--without consulting the McMahons because such contracts are unusual and restrict the business opportunities and economic advantage of the enterprise. They should be a last resort and not a desired form of business. If Janney could market the book successfully, why not New Horizons?

To sum up, I stand ready to meet with all of you and with any other attorney but Kemp who conducts himself properly.

Sincerely,

Lewis C. Stanley

cc: Dilts, DeLancey & Kemp, Attention:
Thomas H. Dilts, Esq.

SUPERIOR COURT, LAW DIVISION
Docket No. L 49469-80
SINKER'S INC., a N.J. Corporation, JOHN AUBERT and JOAN AUBERT and NEW HORIZONS BUSINESS SYSTEMS, INC. v. LEWIS C. STANLEY, GEORGE T. McMAHON, GRACE McMAHON and G.M. PRINTING SERVICES, Verified Complaint filed April 29, 1981

Plaintiffs whose principal place of business and residence is Brookside Drive, Skillman, Somerset County, New Jersey, by way of Complaint against the defendants say:

FIRST COUNT

1. Plaintiff, Sinker's Inc., (hereinafter called SINKERS), is a New Jersey Corporation engaged in the business of providing consulting work for its primary client, Merrill Lynch, Pierce, Fenner and Smith.

2. Plaintiff, John Aubert, is employed by SINKERS INC., as its primary consultant. Prior to being employed by SINKERS INC., John Aubert was previously employed by

Janney, Montgomery Scott, a major regional New York Stock Exchange Member, in the field of corporate sinking fund bonds. John Aubert has been engaged in this type of work as his primary occupation for about eight years prior to the date of this Complaint.

3. On or about April 1, 1981, SINKER'S entered into a contract with Merrill Lynch, Pierce, Fenner & Smith (hereinafter referred to as MERRILL LYNCH to provide consulting work, et al., for approximately one year.

4. The primary nature of the consulting work is to analyze corporate sinking fund bond data supplied by MERRILL LYNCH and to update, edit and revise such data and to publish a book, known as the SINKER BOOK. The SINKER BOOK has been copyrighted under the laws of the United States by SINKER'S. SINKER'S has the right to the non-exclusive use of any data or data base

of MERRILL LYNCH or SINKERS incorporated into the SINKER BOOK.

5. On or about January 26, 1980, John Aubert, Joan Aubert, George T. McMahon and Grace McMahon purchased a Southwest Technical Products Computer, Model 6809. (hereinafter called the COMPUTER). John Aubert and Joan Aubert paid $3,886.67 from their personal funds for their share of the cost and George T. McMahon and Grace McMahon paid $3,886.67 from their personal funds for their share of the costs.

6. On or about February 4, 1980, defendant, Lewis C. Stanley, filed a certificate of incorporation in New Jersey for New Horizons Business Systems, Inc., (hereinafter called NEW HORIZONS).

7. NEW HORIZONS, on or about April 4, 1980, held an organizational meeting of the first Board of Directors and Joan L. Aubert was elected President, George T.

McMahon was elected Vice-President, Grace McMahon was elected Treasurer and John L. Aubert was elected Secretary.

8. According to the corporate minutes, no initial shareholders meeting of NEW HORIZONS was held and no shares of stock were issued or have ever been issued.

9. Defendants, George T. McMahon and Grace McMahon operate a business known as G.M. Printing Services and have a print shop located at the Montgomery Shopping Center, Route 206, Rocky Hill, New Jersey.

10. As of the date of this Complaint, the COMPUTER is located in the facilities of the Defendant, G. M. Printing Services.

11. Since the COMPUTER was acquired, G.M. Printing Services, George T. McMahon, John Aubert, Joan Aubert, and SINKER'S have used the COMPUTER for their individual and business endeavors without charge by NEW HORIZONS.

12. On or about January 7, 1981, John

Aubert left the employ of Janney Montgomery Scott to pursue a career of independent consulting services as to corporate sinking fund bonds. In connection with this new career, John Aubert caused SINKER'S INC., to be formed.

13. At various times since the COMPUTER was acquired, John Aubert individually and for SINKER'S INC. has used the COMPUTER to assemble and edit certain data on corporate sinking fund bonds primarily in the evening hours and weekends.

14. At various times since the COMPUTER was acquired, John Aubert has purchased with his own funds, supplies for his individual work, including floppy discs and paper.

15. The data assembled and edited by John Aubert is magnetically stored on a series of floppy discs (hereinafter called DISCS), more particularly listed on Schedule B attached hereto.

16. On or about April 21, 1981, at approximately 7:00 p.m., Defendant, Lewis C. Stanley, entered the premises of G.M. Printing Services and unlawfully took and without the permission of John Aubert, SINKER'S INC., Joan Aubert, the President of New Horizons, and NEW HORIZONS, removed the aforesaid discs into his possession and control and has ever since wrongfully detained and secreted the discs listed on Schedule B.

17. The discs listed on Schedule A are the personal property of John Aubert and SINKER'S INC., and on April 21, 1981, Plaintiff, John Aubert and SINKER'S INC., were lawfully entitled to the possession of same.

18. Defendant, Lewis C. Stanley, an attorney, has not been retained by NEW HORIZONS, nor is he counsel for NEW HORIZONS Corporation or authorized by the President to perform any service for NEW

HORIZONS, and his possession of the discs is unlawful.

19. Defendants, George T. McMahon and Grace McMahon and G.M. Printing Services have conspired with Defendant, Lewis C. Stanley in the unlawful taking of the discs for the apparent purpose of obtaining money from Plaintiffs.

20. Unless the discs are immediately returned to the possession of plaintiffs, plaintiffs, John Aubert and SINKER'S INC. will suffer immediate and irreparable injury as follows:

(a) They will be unable to timely perform their obligations under their contract with MERRILL LYNCH.

(b) they will have to perform substantial and costly work to try to redeplicate the data on the discs.

(c) They may be held in breach of their contract with MERRILL LYNCH for being unable to perform required services.

(d) They may be held accountable to MERRILL LYNCH for the loss of MERRILL LYNCH data and information and the unaccessability of that data to MERRILL LYNCH.

21. Return of the property has been demanded on April 22, 1981, and has not been made.

WHEREFORE, the plaintiffs demand judgment against the defendants, jointly and severally, for:

(a) Possession of the discs attached as Schedule B.
(b) For the value of the property.
(c) Damages for their unlawful detention.
(d) Reasonable attorneys fees and costs of suit.

SECOND COUNT

1. Plaintiffs repeat each and every allegation of the First Count as if more specifically set forth at length.

2. Defendant, Lewis C. Stanley, intentionally and maliciously took possession of property of plaintiffs, the discs, without legal right and with the expectation that his acts would result in obtaining monies from plaintiffs.

3. Defendant has failed and refused to return plaintiffs property after demand

on April 22, 1981.

WHEREFORE, plaintiffs demand judgment against Lewis C. Stanley, for punitive damages.

THIRD COUNT

1. Plaintiffs repeat the allegations of the First and Second Counts as if more specifically set forth at length.

2. On April 22, 1981, Defendants, George T. McMahon, Grace McMahon, and G. M. Printing Services, changed the locks on the premises where the COMPUTER is located, thereby denying ready access to Plaintiffs. Prior to this date, Plaintiffs had keys to the premises permitting them ready access to the COMPUTER.

3. Plaintiffs are entitled to free and complete access to the Computer and the space where the Computer is situated.

4. As a result of Defendants' unlawful actions, Plaintiffs have been damaged.

5. In spite of Plaintiffs' demands

for keys to the premises and free access to the Computer, Defendants, George T. McMahon and Grace McMahon and G. M. Printing Services, have intentionally and maliciously denied Plaintiffs access to the Computer.

WHEREFORE, Plaintiffs demand judgment against the Defendants, George T. McMahon, Grace McMahon and G. M. Printing Services jointly and severally for:

(a) Either complete and free access to the Computer by having keys to the premises or possession of the Computer.

(b) For the value of the property.

(c) Damages for unlawful detention of the Computer.

(d) Punitive damages.

(e) Costs and reasonable attorneys' fees.

DILTS, DE LANCEY & KEMP
Attorneys for Plaintiffs

By: Richard D. Kemp

JURY DEMAND

Plaintiffs demand a trial by jury as to all issues so triable.

VERIFICATION

I hereby state that the foregoing allegations made by Plaintiffs are true. I am aware that if any of the foregoing are willfully false, I am subject to punishment.

JOHN AUBERT, Individually and as President of SINKER'S, INC.

JOAN AUBERT, Individually, and as President of NEW HORIZONS BUSINESS SYSTEMS, INC.

SUPERIOR COURT, LAW DIVISION
Docket No. L 49469-80
Order to Show Cause with
Temporary Restraints filed
April 29, 1981

This matter having been opened to the Court, ex parte, by Dilts, DeLancey & Kemp, Esquires, attorneys for the plaintiffs, and a Verified Complaint having been filed by plaintiffs, with Supporting Affidavits, and the Court having considered the Affidavits and Complaint and it appearing to the Court that the plaintiffs will probably suffer immediate and irreparable damages unless this Order issues, as more particularly set forth in the Affidavits; it is on this 29th day of April, 1981,

ORDERED that the defendants show cause before this Court at the Court House in Trenton, New Jersey on 5th day of May, 1981 at 1:30 o'clock in the afternoon, why the plaintiffs should not be entitled to immediate possession of the

computer discs attached to the Complaint as Exhibit A and access to the computer; and why a Writ of Replevin should not issue; and

IT IS FURTHER ORDERED that a true copy of this Order to Show Cause, Verified Complaint and Affidavits be served upon the defendants, by personal delivery, by attorneys for the plaintiffs, or their agents, within two (2) days from the date hereof; and

IT IS FURTHER ORDERED that the defendants file any responsive papers and Answer at least three (3) days before the return date hereof; and

IT IS FURTHER ORDERED that the defendants be temporarily restrained from copying, selling or otherwise disposing of the discs; and

IT IS FURTHER ORDERED that these temporary restraints may be dissolved by the Court upon two (2) days notice to all parties.

Robert E. Gaynor, J.S.C.

SUPERIOR COURT, LAW DIVISION
Docket No. L 49469-80
CROSS-MOTIONS ON SHOW CAUSE
ORDER filed May 4, 1981

To: Dilts, DeLancey & Kemp, Attorneys
for Plaintiffs, 4 E. Cliff St ,
Somerville, N.J.

TAKE NOTICE that on May 5, 1981 at 1:30 P.M., in the Superior Court before the Honorable Robert E. Gaynor at the County Court House Annex, Somerville, N.J., the undersigned attorney for the defendants shall apply, after cross-examination of the plaintiff affiants John Aubert and Joan Aubert as to their certifications in lieu of affidavit which wrongfully induced the issuance of an Order to Show Cause with temporary restraints at the said time and place, for an Order:

(A) Striking the designation of New Horizons Business Systems, Inc., as a plaintiff upon the ground that such is scandalous and unethical in that the Complaint is adverse to the interests of New

Horizons, R.4:6-5;

(B) Severing all claims against the undersigned attorney Lewis C. Stanley for trial and counterclaim before a jury as a matter of right in the Law Division and because their joinder with all other claims, which are fundamentally equitable in nature since they involve duties, rights, obligations, and property of equal partners in New Horizons and are properly cognizable in the Chancery Division, is not only inconvenient but prejudicial to New Horizons, George McMahon and Grace McMahon, R.4:38-2 (a);

(C) Transferring all claims other than those relating to Lewis C. Stanley to the Chancery Division since the determination of who is the true owner of the property in the magnetic computer discs in question must be based upon equitable principles of partners and equal owner-directors of a small closely held corpora-

tion and also for discovery, full disclosure and an accounting of the business wrongfully diverted by plaintiffs Aubert from New Horizons as well as a judgment declaratory of the rights, duties, obligations and property of the equal partners John and Joan Aubert and George and Grace McMahon, R.4:3-1 (a) (2);

(D) Directing that plaintiffs John and Joan Aubert and Sinkers Inc., deposit in court all funds received from Merrill Lynch Pierce, Fenner & Smith and any other third parties for contracts and work performable by New Horizons until such time as the Court may determine whether such contracts and work properly belong to New Horizons or the plaintiffs Aubert and Sinkers lest the plaintiffs fritter away such funds and become judgment-proof or in the alternative ordering them to file a surety bond for the full value of such contracts and work;

(E) Ordering that the magnetic computer discs deposited for safekeeping in the Montgomery National Bank by Lewis C. Stanley be returned to New Horizons to be kept and worked on and utilized only at the principal place of New Horizons Business during normal business hours and by mutual consent of all partners in New Horizons at other hours and for the business purposes of New Horizons;

(F) Ordering plaintiffs Aubert to return forthwith to the principal place of business of New Horizons all property and things they removed therefrom without the knowledge and consent of their co-partners George and Grace McMahon;

(G) Upon the ground of unclean hands and failure to make full disclosure to the Court in obtaining wrongfully an Order to Show Cause with temporary restraints,

(1) Vacating the said Order and dismissing the Complaint with prejudice

and costs;

(2) Indemnifying and reimbursing George and Grace McMahon for reasonable costs, expenses and counsel fees in connection with the Order to Show Cause pursuant to the Seventh Article of the Certificate of Incorporation of New Horizons by ordering plaintiffs Aubert and Sinkers to pay sa .

Defendants shall rely upon the annexed letter of Lewis C. Stanley dated April 27, 1981 which is made a part hereof as well as cross-examination of the plaintiffs Aubert pursuant to a Notice in lieu of Subpoena served upon plaintiffs' counsel.

Dated: May 3, 1981.

Lewis C. Stanley
Attorney for
Defendants

ORDER TO ACCOUNT, LAW DIVISION
Docket No. L 49469-80
Order for Aubert-Sinkers to
Account, Filed May 5, 1981

Nota Bene: This document was so substantially altered from its draft version, reworded and supplemented in the Judge's own handwriting that it seemed necessary to annex the photocopy of the ultimate Order to obviate the difficulties in explaining. It is affixed to the following page.

DILTS, DELANCEY & KEMP
4 EAST CLIFF STREET
P. O. BOX 895
SOMERVILLE, N. J. 08876
(201) 722-5151
ATTORNEYS FOR Plaintiffs

Plaintiff
SINKER'S INC., a New Jersey Corporation, JOHN AUBERT and JOAN AUBERT and NEW HORIZON'S BUSINESS SYSTEMS, INC.

vs.

Defendant
LEWIS C. STANLEY, GEORGE T. McMAHON, GRACE McMAHON and G M PRINTING SERVICES

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: SOMERSET COUNTY

Docket No. L 49469-80

CIVIL ACTION

ORDER ~~OR DISMISSAL~~

This matter having been opened to the Court by Dilts, DeLancey & Kemp, Esquires, attorneys for the plaintiffs, on the return date of an Order to Show Cause, and it appearing to the Court that ~~there is a probability that final judgment will be rendered on behalf of the plaintiffs for possession and~~ that plaintiffs will probably suffer immediate and irreparable damages unless this Order issues; it is on this 5th day of May, 1981,

ORDERED as follows:

1. Plaintiffs John Aubert shall be entitled to immediate possession of

the discs attached to the Complaint as Exhibit A and the Montgomery National Bank shall release the said discs which were ~~defendant, Lewis C. Stanley, shall immediately deliver~~ deposited with them in escrow by Lewis C. Stanley, Esq. and deliver ~~possession of the discs to plaintiffs.~~ same to the plaintiff, John Aubert.

~~2. In the event the defendant, Lewis C. Stanley, fails to delivery possession with two (2) days after written demand, plaintiffs shall be entitled to a writ of replevin to be issued by the Clerk of the Court.~~

~~J.S.C.~~

2. Whereas it appears that the plaintiffs and defendants, McMahon, may be benefited by the performance of a certain contract between Dinkers' Inc. and Merrill Lynch, Pierce Fenner & Smith, said discs shall be used by the plaintiffs for the performance of said contract and no other use pending further Court order.

3. Plaintiffs shall account monthly to defendants, McMahon, for all monies received pursuant to the Merrill, Lynch etc contract.

4. The pending motions and cross-motion are adjourned to May 22, 1981.

ROBERT E. GAYNOR, J.S.C.

SUPERIOR COURT, LAW DIVISION
Docket No. L 49469-80
Certified Statement of McMahons-
May 16, 1981 as to Disqualifi-
cation Motion by Aubert-Sinkers

CERTIFICATION

George T. McMahon and Grace McMahon, in lieu of affidavit pursuant to R.1:4-4 (b), certify and say:

1. We are defendants in the foregoing action and have been shown the letters dated May 7 and May 13, 1981 of plaintiffs' counsel received by Lewis C. Stanley, attorney for us and New Horizons Business Systems, Inc.

2. Mr. Stanley has offered to withdraw as counsel so that there will be no obscuring the issues of the extent to which the plaintiffs should account to us for their attempts to defraud and deprive New Horizons, in which we are equal partners with the plaintiffs Aubert who solicited us to become their partners, of business and opportunities which the

Auberts are obliged to bring to New Horizons.

3. We believe Mr. Stanley to be, not only a fine attorney, but a man of principle and honor who is charging us very modest fees not only because he knows our situation but because he knows that we have been unjustly treated by John Aubert who readily accepted Mr. Stanley as counsel to New Horizons when we proposed him because he said Mr. Stanley was a friend of his. Mr. Stanley has gone out of his way to tell us in no uncertain terms that he would not seek for us any personal advantage as against the Auberts but only that to which we are entitled as partners in New Horizons.

4. At no time was there ever any proposal or discussion by the Auberts to engage anyone but Mr. Stanley as attorney for New Horizons. We are insisting that he continue his representation of New

Horizons and us and reject the attacks upon him as scandalous and malicious. We did not believe it necessary to ask but Mr. Stanley has assured us that he has never received any information or confidences from the Auberts which could be used to their detriment or to our detriment.

We certify that the foregoing statements made by us are true. We are aware that if any of the foregoing statements made by us are wilfully false, we are subject to punishment.

Dated: May 16, 1981 George T. McMahon

Grace McMahon

SUPERIOR COURT, LAW DIVISION
Docket No. L49469-80
Order Denying Disqualification, striking "without prejudice"
Filed June 4, 1981

This matter having been brought before the Court on May 22, 1981, by James O. DeLancey, Esq. of the firm Dilts, DeLancey and Kemp, attorneys for plaintiffs, and Lewis C. Stanley, Esq., attorney for defendants and the Court having read the papers filed herein, and having heard the argument of counsel and for good cause shown;

IT IS ON THIS 4th day of June, 1981, ORDERED:

1. The relief sought in defendants' motion is hereby denied without prejudice.

2. The plaintiffs' request to compel Lewis C. Stanley, Esq. to relieve himself as counsel for all other defendants is hereby denied ~~without prejudice~~.*

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*The words "without prejudice" were stricken from the Order by the Judge.

3. The plaintiffs' motion is in all other respects denied without prejudice.

Robert E. Gaynor, J.S.C.

SUPERIOR COURT, LAW DIVISION
Docket No. L 49469-80
Order, October 29, 1981, permitting Plaintiffs to Dismiss and Transfering Counterclaims of McMahons in the Interest of New Horizons to the Chancery Division

This 29th day of October 1981; This matter being opened to the Court by renewed motion of Lewis C. Stanley, attorney for defendants-counterclaimants, upon due notice to Dilts, DeLancey & Kemp, attorneys for plaintiffs, for transfer of certain matters in dispute to the Chancery Division as being primarily equitable in nature; and being reconsidered by the Court on September 25, 1981 in the presence of counsel for the parties; and it appearing that the plaintiffs have voluntarily dismissed the complaint, which voluntary dismissal was determined by the Court on July 2, 1981 not to be effective provided defendants file answering pleadings within a stated period of time; and

it appearing that the defendants have filed such answering pleadings; and it appearing that, upon reconsideration, it has been determined by the Court that it was not proper to so rule with respect to plaintiffs' voluntary dismissal of the action, but rather that such voluntary dismissal should be permitted provided it did not preclude consideration of defendants' claims which are primarily equitable in nature; and it appearing, by virtue of the voluntary dismissal of the complaint and the filing of a counterclaim by the defendants, the remaining matters in dispute are primarily addressed to the equitable jurisdiction of the Superior Court; and good cause appearing, it is therefore on this 29th day of October 1981;

ORDERED, that the within case be transferred to the Chancery Division; and

IT IS FURTHER ORDERED that the Order dated May 5, 1981 shall remain in full force and effect until further order of the Court; and

IT IS FURTHER ORDERED that depositions of the plaintiffs-defendants on the counterclaims may be taken in accordance with the Rules; and

IT IS FURTHER ORDERED that all motions by defendants-counterclaimants be dismissed as moot by virtue of the voluntary dismissal of the complaint; and

IT IS FURTHER ORDERED that the plaintiffs shall be permitted to file an Answer to the Counterclaim of the defendants and that the plaintiffs shall be permitted to file a counterclaim against the defendants' counterclaim, within twenty (20) days of the date of this Order; and

IT IS FURTHER ORDERED that application

for costs and counsel fees may be made in the Chancery Division proceedings.

Robert E. Gaynor, J.S.C.